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No. 1490

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc.,

Appellant,

vs.

GRENVILLE M. DODGE AND FRANK WATERHOUSE,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO., PRINT, 1642 HOWARD ST., S. F., CAL.

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In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Respondents.

Order Extending Time to File Record.

Now, on this day, upon application of Bogle, Hardin & Spooner, attorneys for respondent, and for sufficient cause appearing, it is ordered that the time within which the clerk shall prepare, certify and transmit the record on appeal in this cause to the Circuit Court of Appeals, be, and the same is hereby, extended thirty days from this date.

C. H. HANFORD,

Judge.

Dated at Seattle, Washington, July 5, 1907.

[Endorsed]: Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 5, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

No. 1490. United States Circuit Court of Appeals, for the Ninth Circuit. Filed Jul. 29, 1907. F.

D. Monckton, Clerk. Re-filed Aug. 12, 1907. F. D. Monckton, Clerk.

In the Circuit Court of the United States, in and for the Western District of Washington, Northern Division, Ninth Circuit.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Incorporated (a Corporation), FRANK WATERHOUSE, Individually,

Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the Western District of Washington.

Grenville M. Dodge of New York City, and a citizen of the State of New York, brings this, his bill, against Frank Waterhouse & Co., Incorporated, a corporation organized under and by virtue of the laws of the State of Washington, and a citizen of the State of Washington, and Frank Waterhouse of

Seattle, Washington, a citizen of the State of Washington.

And thereupon your orator complains and says:

I.

That your orator is and was at the times hereinafter mentioned, a citizen of the State of New York, and resided and now resides in the city of New York, in the county and State of New York.

II.

That the defendant, the Frank Waterhouse & Co., Inc., is and was at the same time a corporation duly incorporated and existing under the laws of the State of Washington, and a citizen of the State of Washington, and that the defendant, Frank Waterhouse, is and was at the same time, a citizen of the State of Washington, and resided and now resides in the city of Seattle, State of Washington.

III.

That, in the month of February, 1904, the North Alaska Steamship Company, a corporation organized under and by virtue of the laws of the State of New York, entered into an agreement with the defendant, Frank Waterhouse & Co., Inc., to purchase of said defendant that certain steamship "Garonne," registered at Seattle, Washington, and of which steamer the said defendant was then the owner, for the sum of eighty-five thousand dollars

($85,000), payable partly in cash, and the balance in deferred payments.

IV.

That your orator further states that, in order to make the payments on said steamer "Garonne," the North Alaska Steamship Company, on or about May 13th, 1904, borrowed of said plaintiff a large sum of money, to wit: the sum of thirteen thousand five hundred dollars ($13,500.00), the whole or the greater part of which was, as your orator is informed and believes, paid to said defendant, Frank Waterhouse & Co., Inc., as part payments on the purchase price of said steamer "Garonne," and for which sum said steamship company agreed in writing to give your orator a mortgage on said steamship.

V.

And your orator further states that on or about June 2, 1904, there was an accounting had at Seattle, Washington, between the said North Alaska Steamship Company and your orator, and also between said North Alaska Steamship Company and said defendant, Frank Waterhouse & Co., Inc., and that on said accounting it was found that the North Alaska Steamship Company was indebted to your orator in the sum of ten thousand dollars ($10,000.00), being the balance due to the plaintiff on the money loaned as aforesaid, and that said North Alaska Steamship Company was also indebted to

said defendant, Frank Waterhouse & Co., Inc., in the sum of thirty-seven thousand and six hundred seventy-one and 46/100 dollars ($37,671.46), being the balance due said defendant on the purchase price of said steamer "Garonne."

VI.

And your orator further states that on or about June 2, 1904, said steamer "Garonne" was at the port of Seattle in the possession of the North Alaska Steamship Company under the contract of sale above mentioned, still registered in the name of the defendant, Frank Waterhouse & Co., Inc., loaded and equipped and ready to sail for the north and that at said time one Frank S. Pusey, who was the agent of and was acting for your orator, was present at said Seattle for the purpose of securing the indebtedness from the North Alaska Steamship Company to your orator, which was then due and payable, by appropriate legal proceedings against said steamer "Garonne," and against the North Alaska Steamship Company, to restrain and prevent said steamer from proceeding to the north, and to attach or libel said steamer for said indebtedness to your orator, as your orator had a right to do under the laws and practice of the State of Washington, and under the laws and practice of the United States, relating to its admiralty jurisdiction; but that at the request of said defendants, Frank Waterhouse &

Co., Inc., and Frank Waterhouse, and upon the agreement hereinafter set forth and relying upon such agreement, your orator took no action against said steamship, or against the North Alaska Steamship Company, whereby he lost the security which he could have then obtained, and entered into the following written agreement with the said defendant, Frank Waterhouse & Co., Inc., which agreement is as follows:

"Memorandum, between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co., Inc., of Seattle, Washington.

The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about thirty-seven thousand six hundred seventy-one and 46/100 dollars ($37,671.46/100), being the balance due on the purchase price of the steamship 'Garonne,' and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money.

It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Company upon the Steamship 'Garonne,' to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgages, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steam-

ship Company, payable to them as trustee for the amount so owing to said Dodge, said note to be payable in two months from date.

It is agreed that said Waterhouse & Co., Inc., in acting as such trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

FRANK S. PUSEY, Agent,
For G. M. DODGE.

FRANK WATERHOUSE & CO., Inc.,
By FRANK WATERHOUSE, President."

And that also, on said June 2d, 1904, said North Alaska Steamship Company delivered to said defendant, Frank Waterhouse & Co., Incorporated, as trustee for your orator, its promissory note in words and figures following, to wit:

"$10,000.00 Seattle, Wash., June 2d, 1904.

On or before two months after date, we promise to pay to the order of Frank Waterhouse & Co., Inc., as trustee, the sum of ten thousand and 00/100 dollars, with interest at the rate of seven per cent per annum from date. Negotiable and payable at the Seattle National Bank, Seattle, Wash. If suit is brought on this note or it becomes advisable to place the same in the hands of an attorney for collection, we agree to pay an additional sum equal to five per

cent upon the amount of this note as an attorney's fee.

NORTH ALASKA STEAMSHIP COMPANY,
By CHARLES B. SMITH,
President."

VII.

And your orator further states that said defendant, Frank Waterhouse & Co., Inc., failed to carry out the trust on their part to be performed under and pursuant to said trust agreement, and failed and neglected to protect your orator in the premises, and failed to take a mortgage from said North Alaska Steamship Company; but, contrary to the said trust assumed by us, it retained the title to said steamship "Garonne," and, notwithstanding that the retention of the title of said steamship under said trust agreement was in legal effect a holding as trustee for the benefit of themselves and your orator, said defendants, Frank Waterhouse & Co., Inc., and Frank Waterhouse, without notice to your orator, and without his knowledge, obtained the possession of said steamship "Garonne" from said North Alaska Steamship Company sometime in June or July, 1904, and thereafter without notice to your orator, and without his knowledge or consent, and without any consideration for the rights of your orator or of the terms of said trust agreement, or of the duties of said defendant, Frank Waterhouse & Co., Inc.,

as such trustee, and in violation thereof and in bad faith, and for the purpose of injuring your orator, sold or attempted to sell the said steamship "Garonne" to the defendant, the Merchants' and Miners' Steamship Company, a corporation organized under and by virtue of the laws of the State of New York, in which company, as your orator is informed, the defendant, Frank Waterhouse, the president of the defendant Frank Waterhouse & Co., Inc., was interested as a promoter and stockholder, from which sale both the defendants Waterhouse & Co., Inc., and Frank Waterhouse secured or attempted to secure to themselves profits and advantages to the injury of your orator and in defiance of his rights.

VIII.

And your orator further states that said North Alaska Steamship Company has not paid the amount of its note aforesaid for ten thousand dollars ($10,000.00), or any part thereof to your orator, and that your orator has not received said sum or any part thereof from any source whatsoever.

IX.

And your orator further states that said steamer "Garonne," on June 2d, 1904, was in first-class condition, thoroughly seaworthy, having been repaired and put in first-class condition shortly prior to that time at an expense of over twenty-five thousand dol-

lars ($25,000.00), and that when said steamer "Garonne" was turned over by the North Alaska Steamship Company to said defendant, Frank Waterhouse & Co., Inc., or Frank Waterhouse, she was still in first-class condition and thoroughly seaworthy, and worth upward of one hundred thousand dollars ($100,000.00), and was worth much more than sufficient to pay all claims against her, including the claim of your orator for ten thousand dollars ($10,000.00) as herein set forth, and that said steamer "Garonne" was at the time of sale or pretended sale by the defendant, Frank Waterhouse & Co., Inc., or Frank Waterhouse, to the Merchants' & Miners' Steamship Company worth upward of one hundred thousand dollars ($100,000.00).

X.

And your orator further states that he did not learn that said steamer "Garonne" had been delivered to said defendant, Frank Waterhouse & Co., Inc., or Frank Waterhouse, and that said defendant had sold or attempted to sell the same to said Merchants' and Miners' Steamship Company until on or after the 19th day of August, 1904, and that your orator then demanded of said defendants Frank Waterhouse & Co., Inc., and Frank Waterhouse, an accounting as trustee under said trust agreement and for the payment to him of the ten thousand dol-

lars ($10,000.00) due him as aforesaid with interest, but that said defendants Frank Waterhouse & Co., Inc., have and each of them has failed and refused and still fail and refuse to render any such accounting, or to in any way account to your orator under said trust agreement or otherwise, and simply denies that your orator has any rights whatsoever in the premises.

XI.

And your orator further says that he is ignorant of all matters connected with the sale of the steamship "Garonne" to the Merchants' & Miners' Steamship Company, and that he is ignorant as to whether there has been an actual sale of said steamship or not, or if so, whether the purchase price of said steamship was a fair and reasonable one; and that the defendant Frank Waterhouse, is made a party defendant for the reason that it was through him and relying upon his representations and assurances that your orator entered into said contract with Frank Waterhouse & Co., Inc., of which he then was and still is president, and that, as your orator is informed, he owns a controlling or large interest in said Frank Waterhouse & Co., Inc., and in the Merchants' & Miners' Steamship Company, and that he personally carried through the transactions for and the sale of the said steamer "Garonne" to said Merchants' & Miners' Steamship Co., and personally

obtained a large profit or advantage therefrom, and in many ways, the full knowledge of your orator's rights under said contract, and in bad faith and with fraudulent intent, worked and acted to the injury and damage of your orator as aforesaid.

XII.

That the matter in dispute in this action, exclusive of interest and costs, exceeds in value the sum of two thousand dollars ($2,000.00).

To the end therefore that your orator may have that relief which he can only obtain in a court of equity, and inasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only remediable in a court of equity, where matters of this kind are properly cognizable and reviewable; and that the defendants, Frank Waterhouse & Co., Inc., Frank Waterhouse, and each of them shall truly make answer according to the best of the knowledge, information and belief of each of them, to all and singular the matters and charges aforesaid, your orator hereby waiving pursuant to the statutes, the necessity of the answer of either of the said defendants being put in under the oath of such defendant, and that as full and particular in every respect as if the same were here again repeated, and he thereunto particularly interrogated.

And that an account be taken of all the acts and transactions of said Frank Waterhouse & Co., Inc., as trustee as aforesaid, touching or in any wise appertaining to the matters hereinbefore set forth, and particularly of all sums of money and other property of whatsoever kind or nature that has come into the hands of or been received by the said defendant, or any of its officers, agents or employees, for its use or benefit or in its behalf, by reason of the sale of the steamer "Garonne," and of the value of any and all property so received other than money; and that the said defendant be decreed to pay and deliver to your orator whatever shall thereupon be found due him from the said defendant; or that this Court impress the terms of said trust agreement upon the said proceeds, and proceed to administer said trust for the protection of your orator.

And, if it should appear upon said accounting that the defendant, Frank Waterhouse, has personally obtained any profit or advantage from the sale of said steamer "Garonne," then that your orator have similar relief against him.

And, if it should appear upon said accounting that your orator has been injured and has suffered damage by reason of the neglect, default or failure of the defendant Frank Waterhouse & Co., Inc., to observe and perform in good faith its said contract with your orator, or by reason of any wrongful act or acts

of either of the defendants, then that such defendant or defendants shall be decreed to pay to your orator the amount of such damage.

And that your orator shall recover of said defendant or defendants his costs in this behalf incurred, and also such sum as this Court may deem reasonable as an attorney's fee.

And that your orator have such other and further relief in the premises as the nature of the case shall require and shall be agreeable to equity and good conscience.

May it please your Honors to grant unto your orator a writ of subpoena issued by and under the seal of this Honorable Court and directed to said defendants, Frank Waterhouse & Co., Inc., and Frank Waterhouse, commanding them and each of them on a certain date and under a certain penalty in said writ to be stated, personally to appear before your Honors in this Honorable Court, and then and there full, true and perfect answers make to all and singular the premises, and further to stand and perform and abide such further orders, direction and decree herein as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

And your orator will ever pray.

GEO. H. KING,
Solicitor for the Complainant.

United States of America,
State of Washington,
County of King,—ss.

George H. King, being first duly sworn, on his oath deposes and says that he is the solicitor for the plaintiff in the above-entitled action; that the plaintiff does not reside and is not now within the State of Washington or the District of Washington; that affiant is familiar with the matters and things alleged in the foregoing bill, and he therefore verifies this bill for and on behalf of the said plaintiff, and he further states that the allegations and averments set forth in the foregoing bill are true, except those made upon information and belief ,and that those made upon information and belief are true as he verily believes.

GEO. H. KING,

Subscribed and sworn to before me this 26th day of April, 1905.

[Seal] H. P. CLISE,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

Service of all subsequent papers in this action except writs and process, may be made at the office of the undersigned, at Room 401, Globe Block, Cor-

ner First Avenue & Madison St., Seattle, King County, Washington.

GEORGE H. KING,
Solicitor for Plaintiff.

[Endorsed]: Bill In Equity for an Accounting. Filed in the U. S. Circuit Court, Western Dist. of Washington, April 26, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the United States Circuit Court, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,
Complainant,
vs.
FRANK WATERHOUSE AND COMPANY, INC (a Corporation), and FRANK WATERHOUSE,
Defendants.

Answer.

These respondents, Frank Waterhouse and Company, Inc., and Frank Waterhouse, answering so much and such parts of said bill of complaint as they are advised it is material or necessary for them to answer unto, say:

I.

They admit upon information and belief that said

complainant is a citizen and resident of the State of New York.

II.

They admit that respondent Frank Waterhouse and Company, Inc., is a corporation organized under the general laws of the State of Washington, and a citizen of said State; and that Frank Waterhouse is a citizen and resident of said State.

III.

They admit that the North Alaska Steamship Company, a corporation organized under the laws of the State of New York, entered into an agreement with respondent company to purchase the steamship "Garonne" for the sum of eighty-five thousand ($85,000.) Respondents show that said agreement was negotiated by one W. H. Ferguson for and on behalf of the North Alaska Steamship Company on or about February 3d, 1904, terms and conditions thereof being as follows: $1,000 in cash, which was paid on the day said contract was entered into; $14,000 to be paid on or before February 15th, 1904; and the remaining $70,000 to be evidenced by the notes of North Alaska Steamship Co. payable as follows: $10,000 March 10th, 1904; $10,000, June 15th, 1904; $5,000, September 15th, 1904; $5,000, November 15th, 1904; $5,000, February 15th, 1905; $5,000, April 15th, 1905; $5,000, June 15th, 1905; $5,000, August 15th, 1905; $5,000, October 15th, 1905;

$10,000, December 15th, 1905; and $5,000, March 15th, 1906; said deferred payments to be secured by first mortgage on said steamship together with an assignment of marine insurance thereon to the full amount of such deferred payment and a satisfactory guarantee that said steamship would at all times be kept free and clear of all claims or incumbrances until said indebtedness was paid in full, and said deferred notes to be further secured by collateral security satisfactory to said Frank Waterhouse and Company, Inc.; said vessel was to be conveyed to said North Alaska Steamship Company upon the payment of said $14,000 on February 15th, 1904, and the execution of said notes and the furnishing of the security therefor as hereinabove stated.

IV.

Respondents have been informed that said North Alaska Steamship Company borrowed some money from said complainant, but they have no certain knowledge thereof and call for strict proof in so far as same may be material to their interest. Respondents do not know nor have they any information sufficient to enable them to form a belief whether any of the money that may have been so borrowed by said North Alaska Steamship Company from said complainant was paid on the purchase price of said steamer, and they call for strict proof thereof.

Respondents further state that various sundry payments were made by said North Alaska Steamship Company to respondent company on said contract of purchase, and that all said payments were made in the name of said North Alaska Steamship Company and without any notice or knowledge upon the part of these respondents of the source from which said North Alaska Steamship Company obtained the money to make such payments. Upon information and belief respondents deny that said North Alaska Steamship Company agreed to give a mortgage to said complainant upon said vessel.

V.

Answering the allegations in paragraph V of said bill of complaint, respondents state:

That said North Alaska Steamship Company did not comply with the terms of said contract of purchase. That it paid to respondent company said sum of one thousand dollars ($1,000) on February 3d, 1904, but defaulted in the payment due on February 15th, 1904, and fell behind on all the payments subsequently accruing thereon up to June 2d, 1904. That said North Alaska Steamship Company soon after entering into said contract, desired to make certain alterations and repairs upon said steamship, and applied to this respondent company for permission to take such possession of said steamer as was necessary in order to make such repairs; that

this respondent did give partial possession for that purpose, upon the express agreement upon the part of said North Alaska Steamship Company that no indebtedness would be incurred against said steamer, and that said company would at all times keep funds in the hands of this respondent company amply sufficient to pay off all material and labor claims and other debts incurred by said North Alaska Steamship Company in repairing said steamer and fitting and provisioning her for the season's business. Respondents show and state that they called upon said North Alaska Steamship Company at various and sundry times between February 3d and June 2d, 1904, to perform its agreement by making the payments due under the terms of said contract and furnishing the security for the deferred payments as therein provided, and also to furnish funds with which to pay the claims incurred against said steamer by said North Alaska Steamship Company in said repairs and for supplies ordered by said company for said steamer, but that said North Alaska Steamship Company failed to comply with said demands and induced respondent company to postpone a definite cancellation of said contract for breach thereof by repeated promises of performance within a few days. That on June 2d, 1904, there was a balance due respondent company on said purchase price

from said North Alaska Steamship Company of $37,671.46; that said steamer was loaded with cargo and passengers ready to start on her voyage to Nome, Alaska; that the representative of said North Alaska Steamship Company reported to respondent company that there were claims unpaid against said steamer for repairs and supplies amounting to approximately thirteen thousand dollars ($13,000). That said North Alaska Steamship Company had failed to furnish a guarantee bond guaranteeing said vessel would be kept free of liens and they had failed to furnish the collateral security for said deferred payments according to the terms of their contract, and stated to respondent that they were unable to furnish such security; and respondent company had notified them that said vessel would not be permitted to sail under their charge until said contract was complied with in full. That on or about June 1st, 1904, one Charles B. Smith, president of said North Alaska Steamship Company, arrived in Seattle from New York expecting to go to Nome, Alaska, on said steamer, and one Frank S. Pusey, representing himself as the agent of said complainant, also arrived in Seattle about the same date. That said Smith represented to respondents that his company was prepared to pay off all the claims against said vessel incurred by repairs and supplies as soon as he could notify the New York

office of the amount due therefor; and that they were prepared to pay the balance due respondent company on the purchase price within the next twenty days; and in view of said representations and replying thereon, this respondent company consented to permit said steamer to make said voyage in charge of said North Alaska Steamship Company; that said Smith and said Pusey agreed that said North Alaska Steamship Company was indebted to said complainant in the sum of ten thousand dollars ($10,000), and said Smith, on behalf of his said company, offered to take a bill of sale to said steamer and to execute a mortgage thereon for the balance due respondent company, payable in twenty (20) and forty (40) days from that date, and to give a second mortgage to said complainant to secure the ten thousand dollars ($10,000) due him payable in sixty (60) days from that date; said bill of sale and mortgages to be executed by said company as soon as the money was received by respondent company with which to pay the claims for labor and supplies against said steamer; that said Smith also agreed with said Pusey to assign to him, and on behalf of said North Alaska Steamship Company did assign to said Pusey certain freight due on cargo then being shipped by said steamer to Nome, which was payable on delivery of the cargo at Nome, and said Pusey appointed said

Smith as agent to collect said freight and remit them to the Seattle National Bank for the credit of said complainant. That as a matter of convenience it was agreed between the said Pusey and the said respondent company that one mortgage would be taken on said vessel securing both claims due said respondent company and due said complainant, said mortgage providing for priority in favor of the debt due respondent company; that said Pusey stated to respondent that he did not wish to remain in Seattle for the length of time necessary to get said mortgage executed by said North Alaska Steamship Company, and requested respondent company to act for him in receiving such money as might be remitted by said Smith to said Seattle National Bank for the credit of complainant, and in the acceptance and recording of said mortgage; and the respondent company as a matter of accommodation to said Pusey consented to do so, and the memorandum set forth in the sixth paragraph of said bill of complaint was executed to evidence said arrangement.

Respondent further shows that it was agreed that the note to said complainant should be executed by said North Alaska Steamship Company payable to this respondent company as trustee for said complainant in order that the same might be deposited in the Seattle National Bank and any remittances received by said bank from said Smith could be credited thereon.

VI.

Respondents deny that said Pusey was prevented by them from resorting to any legal proceedings against either said steamer or said North Alaska Steamship Company; on the contrary, they were advised that said complainant had no lien of any kind against said steamer and could not maintain any libel or other action to subject said vessel to his claim. The title to said steamer was in this respondent company, and said North Alaska Steamship Company had defaulted in its contract of purchase and was unable to perform the same at that time; and this respondent company was contemplating declaring said contract forfeited on account of such failure, and was induced to forego doing so by the representations of said Smith that said liens and debts would be paid off in full at once and the balance of the purchase price paid within a short time. Respondent states that in the transactions and conversations with said Pusey leading up to said final arrangement the said Pusey was distinctly informed of the rights of this respondent and the conditions as they existed at that time between it and said North Alaska Steamship Company, and said Pusey at all times recognized the rights of this respondent to full payment before the said North Alaska Steamship Company would be entitled to any interest or property in said steamer.

VII.

Replying to the allegations contained in paragraph VII of the bill of complaint, respondents say they deny that they failed to perform any trust on their part to be performed under the arrangement herein set out, and they deny that they failed and neglected to do anything they were required to do to protect said complainant in the premises.

Respondents state that said North Alaska Steamship Company was a New York corporation, and had its main office and corporate seal in the State of New York, and that all of its officers except said Charles B. Smith, who was president, were then in New York. That respondent company caused to be prepared a bill of sale of said steamer from respondent company to said North Alaska Steamship Company, and also caused to be prepared a mortgage from said North Alaska Steamship Company to respondent company upon said steamer with appropriate conditions and provisions to secure the debts due this respondent company and also that due complainant in accordance with the terms agreed on. That said mortgage was submitted to said Pusey and declared by him to be satisfactory in form; that thereupon respondent company procured said Charles B. Smith, president of said North Alaska Steamship Company, to sign said mortgage for and on behalf of said company, and also to ex-

ecute the notes upon behalf of said company. That respondent company was advised by its own counsel, and by said Pusey, that said Smith as president could not execute said mortgage and that it was necessary that the same should be forwarded to New York to complete the execution thereof by the signature of the secretary under the seal of the corporation and to have the same approved by the Board of Directors of said company. That accordingly this respondent company on June 3d, 1904, enclosed said bill of sale and said mortgage to the Chase National Bank of New York with directions to said bank to deliver said bill of sale to said North Alaska Steamship Company upon the proper execution of said mortgage by that company; and on the same day respondent company notified J. B. Leake, the secretary of said company, and also the Occidental Security Company, the financial agent of said company in New York, of the forwarding of said papers and requested prompt execution thereof. That said North Alaska Steamship Company failed and refused to execute said mortgage and refused to pay the claims incurred by it against said steamship ompany for repairs and supplies. That respondent company upon a thorough investigation ascertained that there were bills outstanding against said steamship, which were liens thereon, for repairs made and supplies furnished to said steam-

ship by said North Alaska Steamship Company amounting in the aggregate to approximately thirty-five thousand dollars ($35,000) instead of thirteen thousand dollars ($13,000) as had been represented to this respondent by the officers of said company. That respondent company thereupon demanded of said North Alaska Steamship Company that it at once pay off said claims and execute said mortgage or otherwise comply with the terms of said contract of purchase, and said North Alaska Steamship Company confessed its inability to do so and voluntarily abandoned said contract and relinquished and released to said respondent company all right under said contract of purchase and surrendered said steamship to said respondent company. That said respondent company thereafter sold said steamship to the Merchants' and Miners' Steamship Company of New York.

Respondents further show that at the time said North Alaska Steamship Company declared its inability to carry out said contract and offered to release said steamer to respondent company, these respondents endeavored to get into communication with said complainant in order to notify him of the position taken by said North Alaska Steamship Company, but that they were informed that said complainant was abroad and they were unable to get into communication with him. That said claims

against said steamship for repairs and supplies were then due and the payments thereof were being pressed against this respondent company and respondent was compelled to take immediate action in order to protect his own interest.

Respondents deny the allegations in said bill of complaint that it failed to carry out said alleged trust upon its part or that it failed and neglected to protect the interest of said complainant in so far as it was able to do so, and it shows that said mortgage was not executed because of the refusal of the said North Alaska Steamship Company to execute the same. Respondents deny that they have in any way violated any trust assumed by said respondent company to said complainant and they deny that they or either of them have in any of the matters referred to acted in bad faith toward said complainant. They show and state that when said North Alaska Steamship Company failed and refused to carry out its said contract of purchase and refused to furnish money to pay off the bills and claims incurred against said steamship and released and relinquished its right to purchase said steamship under said contract, this respondent company found itself in possession of said steamship with an indebtedness of approximately thirty-five thousand dollars ($35,000) thereon, which was immediately due and payable. That in order to raise the money

to pay said claims this respondent company agreed to and did sell and convey said steamship to the Merchants' and Miners' Steamship Company of New York, receiving from said company the sum of thirty thousand dollars ($30,000) in cash, with which this respondent company paid the liens against said steamship to that amount, and taking stock in said Merchants' and Miners' Steamship Company for the remaining interest of this respondent company in said steamer.

Respondents deny that either of them received any profits whatever from said sale and they deny that respondent Frank Waterhouse received any promoter's interest or acquired any stock whatever or any profits or advantages from said sale. Respondents show that said sale to Merchants' and Miners' Steamship Company was made in perfect good faith and as the only means open to the respondent company to raise the funds to pay off and discharge the liens against said steamship incurred by said North Alaska Steamship Company.

VIII.

Respondents have no knowledge or information sufficient to form a belief as to whether said North Alaska Steamship Company has paid its indebtedness to said complainant or not.

IX.

Respondents state in answer to allegations con-

tained in the ninth paragraph of said bill of complaint that said steamship "Garonne" on June 2d, 1904, was in first-class condition and respondent believes that she was thoroughly seaworthy, and they state that the overhauling and repairs made thereon by said North Alaska Steamship Company were charged and done on the credit of this steamer, and that this respondent company was compelled to pay the bills therefor.

Respondents deny that said steamship at the time said North Alaska Steamship Company abandoned its contract of purchase was worth one hundred thousand dollars ($100,000), or that she could have been sold for that sum. Respondents in that connection state that they had been endeavoring to sell said steamship for several years and that they endeavored to sell her at the time said North Alaska Steamship Company abandoned its contract, and that the best price that could be obtained therefor was the sum of sixty-seven thousand dollars ($67,000), being the balance due this respondent company and sufficient cash to pay said liens and claims.

X.

Respondents show that as soon after said transactions as they obtained the address of said complainant they notified him of the actions that has been taken in the premises, and returned to him the said note which has been signed by said Charles B.

Smith for said North Alaska Steamship Company payable to said complainant. They deny that said complainant is entitled to any accounting from the respondent company or either of them, and they deny that the respondents or either of them are indebted to said complainant in any sum whatever.

XI.

Respondents deny that said complainant entered into any arrangement with the North Alaska Steamship Company, or with the respondent company upon or through or relying upon any representation of the respondent, Frank Waterhouse. They admit that said respondent, Frank Waterhouse, owns a controlling interest in Frank Waterhouse and Company, Inc., but they deny that he owns any stock whatever in said Merchants' and Miners' Steamship Company; and they deny that he obtained any profits or advantages from the sale of said steamer "Garonne" to said Merchants' and Miners' Steamship Company; and they deny that either of said respondents in any way whatever worked or acted in bad faith or with fraudulent intent to injure or damage said complainant. On the contrary, respondents state that in all of said transactions they did endeavor to protect the debt due said complainant in so far as they were able to do so without sacrificing the prior claim and interest of the respondent company.

Now having fully answered, respondents ask that said bill of complaint be dismissed and that they go hence without day.

W. H. BOGLE,
Solicitor for Respondents.

State of Washington,
County of King,—ss.

Before the undersigned authority in and for said state and county, Frank Waterhouse this day makes oath that he is one of the respondents named in the foregoing answer; that he has read said answer and knows the contents thereof; that the matters and things therein stated as of the knowledge of respondents are true, and those things stated upon information and belief he verily believes to be true.

FRANK WATERHOUSE.

Sworn to and subscribed before me this 3d day of May, 1905.

[Seal] JAMES P. TOWNSEND,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington, May 3, 1905. A. Reeves, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Exceptions to Answer.

Exceptions taken by the said complainant to the joint answer of the defendants, Frank Waterhouse & Co., and Frank Waterhouse, to complainant's bill of complaint.

1st. For that so much of paragraph III of said answer as commences at the words: "Respondents show that said agreement," etc., on page 1 of said answer, line 32, down to the end of said paragraph III, is irrelevant and immaterial, and contains no defense to the complainant's allegations, and is insufficient.

2d. For that so much of paragraph V of said answer as commences at the words: "That said North Alaska Steamship Company did not comply," etc.,

on page 3 of said answer, line 15, down to the words: "by repeated promises of performance within a few days," on page 4 of said answer, line 13, is irrelevant and immaterial, and does not bear at all on the issues involved in this suit, and is insufficient and contains no defense to the complainant's allegations.

3d. For that the details and allegations contained in paragraph VII of said answer are insufficient as a defense to the allegations contained in complainant's bill of complaint in this: That the denials contained in said paragraph VII, and each of them, are mere conclusions of law; and that the affirmative allegations therein contained are irrelevant, insufficient, sham and evasive, and contain no defense to the complainant's allegations; that the number of shares of stock of the Merchants' and Miners' Steamship Company, of New York, alleged to have been received in payment for said steamer "Garonne," and the value of said shares is not set forth; and that it does not appear therein that defendants endeavored to sell said steamer for any other or better price or terms that that alleged to have been offered by said Miners' and Merchants' Steamship Company.

4th. For that so much of paragraph IX of said answer as commences at the words: "Respondents in that connection state," etc., on page 11 of said

answer, line 2, down to the end of said paragraph IX are sham, insufficient and evasive.

5th. For that so much of paragraph X of said answer as is contained in the first six lines thereof, down to and including the words: "payable to said complainant," on page 11 of said answer, line 16, is irrelevant, immaterial and insufficient, and does not bear on the issues involved in this suit.

Wherefore the complainant comes, and in all particulars aforesaid excepts to the answer of said defendants, on the grounds alleged, that the same is evasive, imperfect, insufficient, irrelevant and immaterial and humbly prays that said defendants may be compelled to put in a full, true, complete and sufficient answer thereto, and particularly that said defendants be required to set out a full and true accounting of the alleged sale of said steamer "Garonne" to said Merchants' & Miners' Steamship Company, and the true character and value of the consideration received therefor, and that he have such other relief in the premises as to the Court may seem proper.

G. W. KING,
Solicitor for Complainant.

Service of the within exceptions, by delivery of a copy to the undersigned is hereby acknowledged this 26th day of May, 1905.

W. H. BOGLE,
Attorney for Defendant.

[Endorsed]: Exceptions to Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington, May 26, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States in and for the Western District of Washington, Northern Division, Ninth Circuit.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Incorporated (a Corporation), FRANK WATERHOUSE, individually,

Defendants.

Order Overruling Exceptions to Answer.

The exceptions of the complainant to the answer filed herein, coming on this day to be heard; the same being fully considered, it is ordered by the Court that said exceptions be, and they are hereby, overruled.

C. H. HANFORD,

Judge.

Dated this 29th day of May, 1905.

[Endorsed]: Order. Filed in the U. S. Circuit Court, Western Dist. of Washington. May 29, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

United States Circuit Court, Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc, et al.,

Defendants.

Memorandum Decision on Exceptions to Answer.

(Filed July 6, 1905.)

An answer under oath having been waived, exceptions for insufficiency and for impertinence cannot be taken to part of an answer, and for that reason the exceptions in this case will be overruled.

At the final hearing the Court will disregard immaterial issues, if any are raised by the answer, and the defendants will be taxed with costs and all expenses occasioned by such immaterial matter.

C. H. HANFORD,

Judge.

[Endorsed]: Memorandum Decision on Exceptions to Answer. Filed in the U. S. Circuit Court,

Western Dist. of Washington. July 6, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division, Ninth Circuit.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE, individually,

Defendants.

Order Overruling Exceptions to Answer, etc.

On hearing complainant's exceptions to defendants' answer, in the above-entitled proceeding, it is hereby

Ordered: That said exceptions be, and the same hereby are overruled, and that said complainant have until the next succeeding rule day in this court to file amendments to his bill, without costs, or to file a general replication to said answer, as he may elect.

To that portion of the above order overruling complainant's exceptions to the answer, complainant, by counsel, excepts, and his exception is allowed.

C. H. HANFORD,

Judge.

Seattle, Washington, July 12th, 1905.

[Endorsed]: Order. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jul. 12, 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States, in and for the Western District of Washington, Northern Division, Ninth Circuit.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Incorporated (a Corporation), FRANK WATERHOUSE, Individually,

Defendants.

Replication.

To the Honorable, the Judges of the Circuit Court of the United States, for the Western District of Washington.

The replicant, Grenville M. Dodge, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendants, Frank Waterhouse & Co., Incorporated, a corporation, and Frank Waterhouse, individually, for replication thereunto saith

that he doth and will aver, maintain, and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

G. W. KING,
Solicitor for Complainant.

United States of America,
State of Washington,
County of King,—ss.

Geo. H. King, being first duly sworn, upon his oath deposes and says: that he is the solicitor for the complainant in the above-entitled action; that said complainant does not reside and is not now within the State of Washington or the Western District of Washington; that affiant is familiar with the matters and things alleged in the foregoing replication and he therefore verifies said replication for and

on behalf of said complainant; and he further states that the allegations and averments set forth in said replication are true, except those made upon information and belief, and that those made upon information and belief are true as he verily believes.

GEO. H. KING.

Subscribed and sworn to before me this 2d day of Aug., 1905.

[Seal] H. R. CLISE,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Service of the within replication by delivery of a copy to the undersigned is hereby acknowledged this 2d day of August, 1905.

W. H. BOGLE.

Per R. J. B.,

Attorney for Defendants.

[Endorsed]: Replication. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 2, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & COMPANY, Incorporated, and FRANK WATERHOUSE,

Defendants.

Stipulation to Take Testimony of Frank S. Pusey.

It is hereby stipulated by and between the parties hereto that the deposition of Frank S. Pusey, a witness on behalf of the complainant, may be taken in rebuttal before Willis Von Valkenburgh, special examiner, at 415 Williams Street, New York City, upon the interrogatories hereto attached, and when so taken may be used at the hearing of said cause, subject to the same objections (except only to the form of the interrogatories), as to competency, rele-

vancy and materiality of the testimony as if said witness was personally present and testifying.

GEO. H. KING,
Solicitor for Complainant.
W. H. BOGLE,
Solicitor for Defendants.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,
Complainant,

vs.

FRANK WATERHOUSE & COMPANY, Incorporated, and FRANK WATERHOUSE,
Defendants.

Direct Interrogatories to Frank S. Pusey.

Deposition of Frank S. Pusey.

Int. 1. Are you the same Frank S. Pusey who formerly testified in this action in New York on September 29, 1905?

Int. 2. I call your attention to a statement contained on page 12, lines 28, 29 and 30, and page 13, lines 1, 2 and 3 of the testimony of Frank Waterhouse for the defense in this action, in which Mr. Waterhouse says: "Mr. Pusey then dropped or dis-

(Deposition of Frank S. Pusey.)

continued his attempts to persuade me to recognize the above-mentioned agreement and asked my co-operation in helping him to obtain payment or satisfactory security for the loan of General Dodge to Mr. Smith," and would ask you if that statement is correct?

Int. 3. If you answer that this statement is not correct then state in what respect it is incorrect, and what actually took place in reference to said agreement at that interview between yourself and Mr. Waterhouse?

Int. 4. I call your attention to the statement on page 13 of the testimony of Frank Waterhouse for the defense in this proceeding to the effect that at the interview in Seattle between Frank Waterhouse, Mr. Charles B. Smith and yourself, therein testified to, whether or not Mr. Smith stated to Mr. Waterhouse in your presence or to your knowledge that the indebtedness due General Dodge, and which you were trying to have paid or secured, was an individual obligation of said Charles B. Smith, and not an obligation of the North Alaska Steamship Company?

Int. 5. State to the best of your knowledge and recollection what was said at that interview by Mr. Smith in reference to that indebtedness?

(Deposition of Frank S. Pusey.)

Int. 6. I call your attention to a statement contained in the testimony of Mr. Frank Waterhouse for the defense in this action on page 16, lines 17 to 21, as follows: "And he (meaning yourself) asked me (meaning Mr. Waterhouse) solely as a matter of accommodation, if I would act in the capacity of attending to General Dodge's interests in securing the completion of this agreement if possible, and the proper carrying of it out," and ask if the same is correct?

In. 7. If you answr that it is not correct, then state to the best of your knowledge and recollection what was said by you at that time on that subject?

Int. 8. State whether or not as the interview between Mr. Waterhouse, Mr. Bogle and yourself in Seattle on or about May 31, 1904, or at any time, you ever knew or heard of the Mr. Hastings mentioned in Mr. Bogle's testimony.

Int. 9. State what, if any thing, was said to you and what data or memorandum if any was shown to you at said interview in reference to the expenses of the North Alaska Steamship Company, or the bills or claims against the steamship "Garonne." State fully what was said to you or what documents were shown to you.

Int. 10. State what, if any thing, was said to you or in your presence at that interview to the effect

(Deposition of Frank S. Pusey.)

that the North Alaska Steamship Company or Mr. Smith, or his New York associates, or any person was prepared to advance the amount of money necessary, if any should prove to be necessary, to pay any expense that might be owing for supplies, repairs and betterments to the steamship "Garonne" as testified to by Mr. Bogle on page 51.

Int. 11. What knowledge had you at that time or at the time of the execution of the trust agreement (Complainant's Exhibit 3), or the note (Complainant's Exhibit 2), or the mortgage (Complainant's Exhibit 4), of any indebtedness against the ship "Garonne," and state the source of your knowledge, if you have any such knowledge?

Int. 12. State what occurred in your presence at that interview or at an interview had the same afternoon, or the next morning between Mr. Waterhouse, Mr. Bogle, Mr. Smith and yourself in reference to further reports of indebtedness against the "Garonne" which had come in subsequent to the prior interview. State what Mr. Smith said to you or in your presence with reference to said indebtedness, particularly with reference to obtaining money from New York to pay the same and to the payment of the same?

Int. 13. I call your attention to the testimony of Mr. Bogle contained between page 52, line 12, and

(Deposition of Frank S. Pusey.)

page 53, line 16, and ask if the same agrees with your knowledge of what occurred in your presence at that interview; if not, then state in what respect said testimony differs with your knowledge of what occurred in your presence at that interview?

Int. 14. State if Mr. Waterhouse, or Mr. Bogle, or Mr. Smith, or any person informed you at any time while you were in Seattle as to the amount that the North Alaska Steamship Company was owing outside the amount due to Mr. Waterhouse on the balance of the purchase price?

Int. 15. State if you know who prepared the trust agreement contained in Complainant's Exhibit 3.

Int. 16. State if the statement in Mr. Bogle's testimony, page 54, lines 17 to 27, in reference to the preparation of the trust agreement (Complainant's Exhibit 3) is correct, if not state in what respect it is incorrect?

Int. 17. You may state if the statement in Mr. Bogle's testimony, page 54, lines 4 and 5, to the effect that you requested Mr. Waterhouse to represent General Dodge's interest as trustee in Seattle is correct; if not, state in what respect it is incorrect?

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE and COMPANY, Incorporated and FRANK WATERHOUSE,

Defendants.

Answers to Interrogatories by Frank S. Pusey.

Answers to interrogatories propounded to Frank S. Pusey, witness for the complainant in the above-entitled action, residing at the city of New York, State of New York, taken by Willis Van Valkenburgh of New York aforesaid, notary public and special examiner, at 15 William street, New York City on May 24, 1906, the said Frank S. Pusey being first duly sworn on oath, deposes and says in answer to;

Int. 1 Answer. I am.

Int. 2 Answer. No it is not correct.

Int. 3 Answer. It is incorrect in that there was no such conversation or occurrence about recognizing any agreement and furthermore there never was

(Deposition of Frank S. Pusey.)

any suggestion by anyone that General Dodge's claim was against Charles B. Smith, but on the contrary was a claim against the North Alaska Steamship Company.

Int. 4 Answer. Mr. Smith did not state to Mr. Waterhouse in my presence that the indebtedness was an individual obligation of his own, but on the contrary stated it was an indebtedness of the North Alaska Steamship Company, and must be taken care of.

Int. 5 Answer. Mr. Smith corroborated all that was stated in the agreement, Complainant's Exhibit 1, and expressed his willingness to do all in his power to protect General Dodge's claim before the steamship sailed.

Int. 6 Answer. This statement of Mr. Waterhouse is not correct.

Int. 7 Answer. I did not ask Mr. Waterhouse to act as trustee for General Dodge, that proposition was made by him (Waterhouse) and presented to me by him in the form of the trust agreement, Complainant's Exhibit 3 to protect General Dodge's claim, and not as a matter of accommodation, but as a settlement with me in order that the steamship might sail without interference by legal proceedings on my part, and in order that I would not attach the steam-

(Deposition of Frank S. Pusey.)

ship "Garonne" or garnishee freight and passenger moneys.

Int. 8. Answer. No, sir, I never knew Mr. Hastings nor heard his name mentioned.

Int. 9. Answer. No statement data or memoranda of any kind relating to expenses bills or claims against the North Alaska Steamship Company or the steamship "Garonne" were shown to me by anyone. The amount due on balance of purchase price and General Dodge's claim against the North Alaska Steamship Company were spoken of, and the amount of freight and passenger moneys due were also spoken of, but nothing was said of any excess of bills against the "Garonne" over freight and passenger moneys, and I had no knowledge of any such excess.

Int. 10 Answer. Nothing whatever was said by Mr. Smith in my presence and nothing was said by me or anyone else that the North Alaska Steamship Company or Mr. Smith, or his New York associates or any other person or persons would advance money for bills incurred for supplies, repairs and betterments for the steamship "Garonne"—no statement was made nor was it suggested that there were bills for supplies, repairs or betterments to the steamship "Garonne" in excess of freight and passenger moneys.

(Deposition of Frank S. Pusey.)

Int. 11 Answer. I had no personal knowledge of any indebtedness against the ship, except the claim of General Dodge and some balance due on the purchase price. I recollect hearing Mr. Waterhouse state that there were some bills still unpaid against the ship, but nothing was said in regard to the payments of those bills in any other way than by using the moneys coming in from the freight and passenger receipts.

Int. 12 Answer. I have no recollection of anything being said about further reports of indebtedness against the steamship "Garonne" which had come in subsequent to the prior interview and nothing was said about obtaining money from New York to pay any indebtedness of the steamship "Garonne" for supplies, betterments or repairs, etc., or of wiring New York for money—nothing of that kind was mentioned.

Int. 13 Answer. Mr. Smith said nothing to me or in my presence in reference to obtaining money from New York to pay any bills existing against the steamship "Garonne" in Seattle, nor did I know of any such bills in excess of freight and passenger moneys and nothing was said about wiring New York for money.

Int. 14 Answer. No; except the amount due General Dodge.

(Deposition of Frank S. Pusey.)

Int. 15 Answer. The attorney for Mr. Waterhouse.

Int. 16 Answer. The statement is incorrect in that I did not prepare any agreement, on the contrary the agreement was entirely prepared by the attorny for Mr. Waterhouse.

Int. 17 Answer. I did not request but I did agree to accept Waterhouse & Company as trustee to represent General Dodge's interest and to protect the same.

FRANK S. PUSEY.

Subscribed and sworn to before me the 24th day of May, 1906.

[Seal] WILLIS VAN VALKENBURG,
Notary Public and Special Examiner.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,
Complainant,
vs.
FRANK WATERHOUSE AND COMPANY, Incorporated, and FRANK WATERHOUSE,
Defendants.

Certificate of Special Examiner to Deposition of Frank S. Pusey.

To all to Whom These Presents Shall Come:

I, Willis Van Valkenburg, notary public, residing and practicing in the County of New York, city of New York, State of New York, and the special examiner named in the annexed stipulation signed by the solicitors for the above-named complainant and the defendants.

Do hereby certify that pursuant to the said stipulation, Frank S. Pusey, the witness named in the said stipulation appeared before me on the 24th day of May, 1906, at 15 William Street, New York City when I took his answers or deposition to the interrogatories propounded by the solicitor for complainant in the above-named action and caused them to be written out on a typewriter, then said answers or deposition was read to the witness who signed them and thereupon completed said deposition, the said answers or deposition being hereunto annexed, and I further certify that previous to such answers or deposition being taken, I duly administered to the said Frank S. Pusey the following oath "Do you solemnly swear that you will true answers make to all such questions as shall be asked you upon these interrogatories without favor or affection to either party and

therein you shall speak the truth, the whole truth and nothing but the truth, so help you God."

In testimony whereof, I, the said notary public and special examiner, have hereunto subscribed my name and affixed my notarial seal this 24th day of May, 1906.

[Seal] WILLIS VAN VALKENBURG,
Notary Public and Special Examiner.

[Endorsed]: Deposition of Frank S. Pusey. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 21, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Defendants.

Stipulation Relative to Taking Testimony.

It is hereby stipulated and agreed by and between the parties hereto that the taking of testimony be-

fore Hon. Eben Smith, Master in Chancery, by virtue of the order of reference made in this cause by said court on the 18th day of September, 1905, be continued over from the next succeeding rule day, to wit, from October 2, 1905, until such time as said Master in Chancery may determine, without prejudice to either of the parties to this action.

GEO. H. KING,
Solicitor for Complainant.
W. H. BOGLE,
Solicitor for Defendant.

Sep. 28, 1905.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

G. M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., et al.,

Defendants.

Subpoena to Frank Waterhouse.

The President of the United States of America to Frank Waterhouse, Greeting:

You are hereby required that all and singular business and excuses being set aside, you appear

and attend before the United States Circuit Court for the Western District of Washington, Northern Division, before Eben Smith, Esq., Master in Chancery of said Court and the Referee to whom by order of said Court was referred the above-entitled action at the office of said Master in Chancery at room 715 in New York Block, in the city of Seattle, King County, Washington, on the 23d day of October, 1905, at 10:00 o'clock A. M., then and there to testify in the above-entitled cause now pending in said court on the part of the plaintiff, and you are not to depart therefrom without the leave of the Court;

And you are further required to bring with you any and all books, papers and documents in your possession, or under your control, or in the possession or under the control of the defendant Frank Waterhouse & Co., Inc., relating or appertaining to the sale of said Frank Waterhouse & Co., Inc., of the steamer "Garonne" to the Merchants' & Miners' Steamship Co. of New York, set out and alleged in your answer filed in this cause:

And you are further required to bring with you and produce any and all vouchers, receipts, or other evidence of payment in your possession, or under the control of the defendant Frank Waterhouse & Co., Inc., showing the payment of $30,000.00 or any part thereof in payment of liens against said steamship

"Garonne," as set out and alleged in paragraph seven of your answer filed in this action, and for failure to attend or to produce the aforesaid papers, or any of them as above required, you will be deemed guilty of contempt of court and liable to pay to the parties aggrieved all loss and damage sustained thereby.

Witness my hand and official seal as United States Master in Chancery, in the District of Washington, Western District, Northern Division, this 18th day of October, A. D. 1905.

[Seal] EBEN SMITH,

As United States Master in Chancery, as above.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Washington,—ss.

I hereby certify and return that I served the annexed Witness Subpoena on the therein named Frank Waterhouse & Co., Inc., et al., by handing to and leaving a true and correct copy thereof with Frank Waterhouse personally at Seattle, Wn., in said District on the 19th day of October, A. D. 1905.

C. B. HOPKINS,
U. S. Marshal.
By W. L. Gritman,
Deputy.

MARSHAL'S FEES:

Service 50
Mileage 12

62¢

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

G. M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc.,

Defendants.

Subpoena to John Jordison.

The President of the United States of America, to John Jordison, Greeting:

You are hereby required that all and singular business and excuses being set aside, you appear and attend before the United Circuit Court for the Western District of Washington, Northern Division, before Eben Smith, Esq., Master in Chancery of said court, and the referee to whom, by order of said Court, was referred the above-entitled action, at the office of said Master in Chancery, at room 715 in the

New York Block, cor. 2d Ave., and Cherry Street, in the city of Seattle, King County, Washington, on the 10th day of January, 1906, at 10 o'clock, A. M., then and there to testify in the above-entitled cause now pending in said court, on the part of the plaintiff, and you are not to depart therefrom without the leave of the Court.

Witness my hand and official seal as United States Master in Chancery for the Western District of Washington, Northern Division, this 8th day of January, A. D. 1906.

[Seal] EBEN SMITH,

As United States Master in Chancery as Above.

United States Marshal's Office,
Western District of Washington.

I hereby certify and return, that I received the within witness subpoena on the 8th of Jan. 1906, and personally served the same on the 8th day of Jan., 1906, on John Jordison by delivering to and leaving with him, said defendant named therein, at Seattle, county of King, in said District, attested copy thereof, at the dwelling-house or usual place of abode of said John Jordison.

C. B. HOPKINS,
U. S. Marshal.
By W. L. Gritman,
Deputy.

MARSHAL'S FEES:

Service	.50¢
Mileage	.12
	.62¢

Seattle, Wn., Jan. 9th, 1906.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

G. M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc.,

Defendants,

Subpoena to James Fowler.

The President of the United States of America, to James Fowler, Greeting:

You are hereby required that all and singular business and excuses being set aside, you appear and attend before the United States Circuit Court for the Western District of Washington, Northern Division, before Eben Smith, Esq., Master in Chancery of said court, and the referee to whom, by order of said Court, was referred the above-entitled ac-

tion, at the office of said Master in Chancery, at room 715 in the New York Block, cor. 2d Ave., and Cherry Street, in the city of Seattle, King County, Washington, on the 5th day of December, 1905, at 10 o'clock A. M., then and there to testify in the above-entitled cause now pending in said court, on the part of the plaintiff, and you are not to depart therefrom without the leave of the Court.

Witness my hand and official seal as United States Master in Chancery for the District of Washington, Western District, Northern Division, this 2d day of December, A. D. 1905.

[Seal] EBEN SMITH,

As United States Master in Chancery as Above.

MARSHAL'S RETURN.

I hereby certify and return that I received the within subpoena in equity on the 2d day of Dec., 1905, and personally served the same on Dec. 2 /05, by delivering and leaving with James Fowler a true and certified copy of the within subpoena.

C. B. HOPKINS,
U. S. Marshal.
By W. L. Gritman,
Deputy.

MARSHAL'S FEES:

Service	.50
Mileage	.12
	.62¢

Advanced witness fees, $1.60.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Stipulation Relative to Appointment of Special Examiner, etc.

It is hereby stipulated by and between the parties hereto and their respective counsel, that N. W. Bolster, Esq., be appointed by the Court special examiner to take further testimony in this case and report the same to the court; and that the testimony heretofore taken in this cause before Hon. Eben Smith, Master in Chancery, and stenographically reported by said N. W. Bolster, be certified

by him to this court together with such other and further testimony as may be taken before said N. W. Bolster.

Dated Seattle, Washington, April 7, 1906.

_____,
Counsel for Complainant.

_____,
Counsel for Defendant,

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,
Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation) and FRANK WATERHOUSE,
Defendants.

Order Appointing Special Examiner.

This cause coming on for hearing on the stipulation by counsel and motion for appointment of a special examiner in this cause, counsel for both parties being present in open court and consenting thereto:

It is hereby ordered that N. W. Bolster, Esq., be and he hereby is appointed special examiner of this

court in this cause, and that this cause be and the same hereby is referred to the said E. W. Bolster, Esq., as special examiner aforesaid, and he is hereby directed to hear testimony and take proofs of all and singular the matters in issue herein and report the same to this court.

And it is further ordered that all the testimony heretofore taken in this cause before Hon. Eben Smith, Master in Chancery, including all exhibits offered in evidence and all objection or objections thereto, which said testimony was stenographically taken down by said N. W. Bolster and by him transcribed into longhand, be by said N. W. Bolster, as special examiner in this cause, certified and reported to this court, together with all future testimony to be taken by him as such special examiner.

And it is further ordered that the time for taking the testimony in this cause on behalf of the defendants is hereby enlarged and extended for a period of 15 days from and after the 5th day of April, 1906, and that the plaintiff have thirty (30) days hereafter in which to present testimony in rebuttal.

Done in open court this 9th day of April, 1906.

(Signed) C. H. HANFORD,

Judge.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERCOURSE & CO. Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Order Appointing Special Examiner.

This cause coming on for hearing on the stipulation by counsel and motion for appointment of a special examiner in this cause, counsel for both parties being present in open court and consenting thereto:

It is hereby ordered that N. W. Nolster, Esq., be and he hereby is appointed special examiner of this court in this cause, and that this cause be and the same hereby is referred to the said N. W. Bolster, Esq., as special examiner aforesaid, and he is hereby directed to hear testimony and take proofs of all and singular the matters in issue herein and report the same to this court.

And it is further ordered that all the testimony heretofore taken in this cause before Hon. Eben

Smith, Master in Chancery, including all exhibits offered in evidence and all objection or objections thereto, which said testimony was stenographically taken down by said N. W. Bolster and by him transcribed into longhand, be by said N. W. Bolster, as special examiner in this case, certified and reported to this court, together with all future testimony to be taken by him as such special examiner.

And it is further ordered that the time for taking the testimony in this cause on behalf of the defendants is hereby enlarged and extended for a period of 15 days from and after the 5th day of April, 1906, and that the plaintiff have thirty (30) days hereafter in which to present testimony in rebuttal.

Done in open court this 9 day of April, 1906.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

G. M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., et al.,

Defendants.

Order Extending Time for Taking Testimony.

This cause coming on for hearing on motion of the complainant for an order directing the special master to report the testimony taken to this court, and the Court being fully advised in the premises:

It is hereby ordered that the time for taking testimony in the above-entitled cause, on behalf of the defendants, be, and the same hereby is enlarged and extended until April 30th, 1906, and that the plaintiff have thirty days thereafter in which to present testimony in rebuttal.

This order to be entered at the cost of the defendants.

Done in open court this 30th day of April, 1906.

C. H. HANFORD,
Judge.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,
Complainant.

vs.

FRANK WATERHOUSE & COMPANY, Incorporated, and FRANK WATERHOUSE,
Defendants,

Order Fixing Time for Taking Testimony.

On motion of the complainant, it is hereby ordered that N. W. Bolster, Esq., Special Examiner, do hereby certify forthwith to this court all the testimony and exhibits taken by him as such special examiner, and also all the testimony and exhibits taken before the late Hon. Eben Smith, Master in Chancery of this court, in accordance with the stipulation between counsel dated April 7th, 1906, and on file in this cause.

Done in open court this 11th day of June, 1906.

C. H. HANFORD,
Judge.

Testimony.

WILLIAM H. ROWE, produced as a witness in behalf of complainant, being first duly cautioned and sworn, testifies as follows:

Q. (By Mr. KING.) State your name.

A. William H. Rowe.

Q. Were you connected with the North Alaska Steamship Company? A. I was, yes, sir.

Q. What position did you hold in it?

A. Vice-president.

Q. Were you in New York in the early part of July, 1904? A. I was.

Q. How near can you fix that date, Mr. Rowe?

(Testimony of William H. Rowe.)

A. Until the 13th day of July, from the first part of the month.

Q. Do you know Mr. Frank Waterhouse?

A. I do.

Q. Was he in New York at that time?

A. He was, in the first of July, yes, sir.

Q. Any earlier than that?

A. I think the last of June or the first of July; I could not be able to fix the exact dates, but at any rate, the first of July.

Q. Was Mr. Bogle there at that same time?

A. He was.

Q. Do you know of any meetings of Mr. Waterhouse and others with reference to the transfer or sale or conveyance of the steamer "Garonne," in New York about that time?

A. Yes, there were such meetings.

Q. Where were those meetings held?

A. At the office of attorney Baldwin and at the office of the Merchants' Association.

Q. Where are those offices?

A. The Merchants' Association is on Broadway; I cannot recall the number, although I have been there a thousand times, I guess. It is in the New York Life Insurance building on Broadway and

(Testimony of William H. Rowe.)

Baldwin's office I think is on Pine street; but I am not sure what street or number.

Q. Were you present at those meetings?

A. I was.

Q. I mean at the meetings?

A. Part of them.

Q. Did you take part in the meetings?

A. Part of them, yes, sir.

Q. And some you did not take part in?

A. Yes.

Q. How many meetings were held, do you know?

A. I do not. I was present at three, I think.

Q. How long, to your knowledge, was Mr. Waterhouse in New York about that time?

A. I should say a week or ten days.

Q. Do you know General Dodge? A. I do.

Q. How long have you known him, either personally or by reputation?

A. I know him personally since 1902, and I have known him by reputation since I was a little child, I guess.

Q. Is he in business in New York?

A. He is.

Q. Do you know where his office is?

A. I do; Number 1, Broadway.

Q. Do you know how long he has had that office?

(Testimony of William H. Rowe.)

A. Ever since I have known him personally and a good deal longer.

Q. You may state whether or not he is a man prominent in business and financial circles in New York? A. He is, very much so.

Q. A well-known man? A. He is.

Q. Did you know of any effort of Mr. Waterhouse, or anyone representing Mr. Waterhouse, to communicate with General Dodge during those meetings, with regard to the sale of the steamer "Garonne"? A. I did not know of it.

Q. You did not know of your own knowledge.?

A. No.

Q. How far was the Merchants' Association's office from General Dodge's office?

A. I should say it is less than a mile.

Q. And Baldwin, Griggs & Baldwin's office?

A. About half-way between. About less than half a mile.

Q. Do you know whether General Dodge's office has telephone communication? A. It had.

Q. Had the Merchants' Association's office?

A. Yes, sir.

Q. And Baldwin, Griggs & Baldwin?

A. Yes.

Q. At the time of those meetings?

(Testimony of William H. Rowe.)

A. Yes.

Q. Did Mr. Waterhouse, or anyone for him, or in his presence, make any statement at that time as to the value of the steamer "Garonne"?

A. No, I do not think so.

Q. Did he make any statement at that time as to any improvements or betterments placed upon her?

A. Yes, quite extensive.

Q. State to the best of your recollection, what he said at that time?

A. I cannot remember the words; but the betterments had exceeded twenty thousand dollars.

Q. Where was that statement made and to whom?

A. I think it was in Baldwin's office.

Q. Do you know whether it was made in reference to the sale or transfer of the steamer to the Merchants' & Miners' Company.

A. No. I think it was made as an effort towards encouragement for the North Alaska Steamship Company to make its payments.

Q. After the "Garonne" left Seattle on June 2d, do you know when she returned to Seattle?

A. I could not fix the day.

Q. Had she returned when those meetings were had in New York?

A. It was during that time.

(Testimony of William H. Rowe.)

Q. Did you see, prior to June 2d, 1904, any advertisement in the public papers of Seattle, with reference to the sailing of the steamer "Garonne"?

A. I did.

Q. You may state whether those advertisements were signed by Frank Waterhouse & Co., incorporated, or not?

A. The name of Frank Waterhouse & Co. was attached as agents for the boat.

Q. As agents for what?

A. For the steamer "Garonne."

Q. As agents for the steamer "Garonne," or for the North Alaska Steamship Company?

A. It was put in the ad.—

Q. Give your best recollection?

A. I should say, it would be for the steamship.

Q. Do you, as vice-president of the North Alaska Steamship Company, know whether Frank Waterhouse was acting as agent for the steamer prior to her sailing for Nome on June 2d, 1904?

A. He was.

Q. Do you know whether he received any commission or compensation as such agent?

A. He charged a commission on the sales of tickets.

Q. Did Mr. Waterhouse, or Waterhouse & Co., have any authority, as to incurring indebtedness against the steamer? A. Full authority.

(Testimony of William H. Rowe.)

Q. Did Mr. Waterhouse ever make any statement to you with reference to incurring indebtedness against the steamer, and his authority to that effect?

A. One of the conditions was that he must—

Q. State whether he did or not?

A. Yes.

Q. When and where was that statement made?

A. In the office of the North Alaska Steamship Company—No. 42 Broadway.

Q. At about when?

A. In the latter part of April, I think.

Q. 1904? A. 1904.

Q. Give that statement.

A. He was very positive and insistent upon being given such authority, that no debts could be contracted without his permission against the "Garonne."

Q. That was acquiesced in by the North Alaska people?

A. I do not think we took a vote on it, but the majority of the board of directors was there that day, I think, although I do not think it was a formal meeting.

Q. During the time that Mr. Frank Waterhouse and Mr. Bogle were in New York in the early part of July, 1904, from what you know of the circum-

(Testimony of William H. Rowe.)

stances at that time, you may state whether or not, in your opinion either of them, if they had desired, would have any difficulty in communicating with General Dodge?

Mr. BOGLE.—I object to that unless it states some facts, instead of his opinion.

A. I do not think they would have any trouble in connecting with him, either in person or his representative; there would have been no trouble anyway with the representative of General Dodge.

Q. (By Mr. KING.) Has General Dodge a regular office there? A. Yes.

Q. That is an office and clerks?

A. He has a manager there all the time, except Sundays; during business hours, I mean.

Q. Were there any meetings with reference to the transfer of the "Garonne," at or about that time, at which you were not present?

A. There were.

Q. Where were those meetings held?

A. At the same place. I was present in the office of Baldwin and also at the Merchants' Association, when the talk relative to the sale of the boat was made, but not actually in my presence.

Q. Not actually in your presence?

(Testimony of William H. Rowe.)

A. Not actually in my presence, but I was in the same rooms at the time.

Q. You were not invited to those meetings?

A. No.

Q. The meetings then, as I understand you, were held in one room, and you were in another room?

A. Yes.

Q. You do not know what took place?

A. No; not only by hearsay.

Q. Do you know of any effort made by Frank Waterhouse, or by Frank Waterhouse & Company, or anybody in their behalf to effect a sale of the steamer "Garonne" at that time, other than with the Merchants' & Miners' Company?

A. Not any that I know of.

Cross-examination.

Q. (By Mr. BOGLE.) Mr. Rowe, what was the object of Mr. Waterhouse's visit to New York on that occasion?

A. I think that it was to sign up the mortgage which had been prepared here relative to the "Garonne," and put it in better shape than it was previous to that time; in fact, to be secured on his deferred payments.

Q. Was he not calling on your company, the North Alaska Steamship Company, to meet the de-

(Testimony of William H. Rowe.)

ferred payments, and also to pay off the indebtedness incurred by that company against the steamer "Garonne"?

A. That was his object, I suppose.

Q. At the meeting to which you have referred, and which was attended by you at the Merchants' Association, a statement was submitted by him, showing the amount of indebtedness incurred against the "Garonne" by the North Alaska Steamship Company, which had been reported to him by those holding claims, was there not? A. Yes.

Q. And also a statement of the balance due him on the purchase price? A. Yes.

Q. Is it not a fact that he called upon the North Alaska Steamship Company at that time to make arrangements to meet those obligations?

A. He did.

Q. Did your company meet them?

A. They did not.

Q. Was it able to meet them? A. No.

Q. What did your company do about it?

A. Simply said they were unable to meet the payments at that time.

Q. How long did these negotiations last before your company finally abandoned its option, Mr. Rowe? Over how many days were they extended?

A. Several days.

(Testimony of William H. Rowe.)

Q. Ultimately, your company formally abandoned its right to purchase the "Garonne," didn't it? A. It did.

Q. And your board of trustees passed a resolution to that effect? A. They did.

Q. And surrendered to Mr. Waterhouse all rights they had in the boat? A. They did.

Q. That was because of their inability to meet the amounts that were due against the boat?

A. Yes.

Q. You knew that General Dodge claimed to be a creditor of the North Alaska Steamship Company, did you? A. I did.

Q. There were quite a number of creditors of the North Alaska Steamship Company, who attended one or more of those meetings, were there not?

A. I do not know personally, of anyone that was a creditor; not at any time while I was present.

Q. Don't you recollect that Mr. Brown—that a man by the name of Brown, who was a creditor of the North Alaska Steamship Company to the extent of some, either twenty or thirty thousand dollars, was called in by your company, or the directors of your company, into consultation over those matters before your company ultimately abandoned their right to purchase the "Garonne"?

(Testimony of William H. Rowe.)

Mr. KING.—We object to the question as immaterial and not proper cross-examination.

A. Of my own knowledge I do not know that.

Q. (By Mr. BOGLE.) Did you meet Mr. Brown in the offices of the Merchants' & Miners' Steamship Company, or the Occidental Securities Company or in the office of McKee & Frost, the attorneys of the North Alaska Steamship Company, during those negotiations?

(Counsel for complainant interposes same objections.)

A. You mean the negotiations of the first of July or about that time?

Q. Yes, on that trip; I do not attempt to designate the date because I do not know which day it was, as it extended over a week.

A. There was only one meeting that I was present at with Mr. Brown, and I cannot tell whether that was at that time or not, and I cannot say whether Mr. Waterhouse was present or not, and that was at the Merchants' Association.

Q. Don't you remember, Mr. Rowe, that Mr. Brown came to see Mr. Waterhouse and myself and subsequently went to see you and the other trustees or directors of the North Alaska Steamship Company, asserting that he held some kind of an agree-

(Testimony of William H. Rowe.)

ment from your company that he was to have a lien on the "Garonne," or on the earnings of the "Garonne" for the amount of his loan?

(Counsel for complainant interposes the same objection.)

A. Yes.

Q. Now, don't you remember that was during those negotiations?

A. It was at that time, yes, but the amounts, Mr. Bogle, you have gotten away beyond when you say, "from twenty to thirty thousand dollars."

Q. What was the amount of Mr. Brown's claims?

Mr. KING.—I object to the question as irrelevant, immaterial and incompetent and as tending to divert the issues.

A. I think about five thousand dollars or something like that.

Q. (By Mr. BOGLE.) How many other creditors of the North Alaska Steamship Company were consulted by the officers and directors of that company during those negotiations?

Mr. KING.—I object to the question as irrelevant and immaterial and not proper cross-examination.

A. None that I know of.

Q. (By Mr. BOGLE.) Don't you remember that there was some widow lady in New York who had

(Testimony of William H. Rowe.)

advanced some money to the company and that she or her representative was consulted by some of you?

(Counsel for complainant interposes same objection.)

A. I do not know of any such lady.

Q. Your company, during those negotiations, was making every effort in its power to arrange to raise the amount of money needed to take care of those claims against the ship, were they not?

A. They were.

Q. And, in so far as you knew, the other directors and officers exhausted every resource to that end, within their power?

A. Within my power, personally.

Q. And, so far as you know, the other directors, were equally diligent in endeavoring to arrange the matter in some way, were they not?

A. Of the North Alaska Steamship Company, yes.

Q. Do you know why General Dodge was not notified by some officer of your company of the pendency of those negotiations?

Mr. KING.—I object to the question for the reason that it calls for the conclusion of the witness and is irrelevant and immaterial, and secondly for the reason that there is no showing that any officer of

(Testimony of William H. Rowe.)

the North Alaska Steamship Company was under any obligation to notify General Dodge at all.

A. I do not.

Q. (By Mr. BOGLE.) You understood, Mr. Rowe, didn't you, that Mr. Waterhouse's object and endeavor was to collect the balance of money that was due him on the purchase price of the ship and on that being paid to him, he was ready to transfer and turn over the ship to whomsoever the company directed?

A. That was as I understood it, yes.

Q. To whomsoever the North Alaska Steamship Company directed?

A. That was as I understood it, yes, sir.

Q. Mr. Rowe, is it not a fact that there was some row on between the North Alaska Steamship Company and some of its officials and Mr. King, with reference to the manner in which some loans or advances had been secured from Mr. King and Mr. Mead by those officers.

(Counsel for complainant objects as irrelevant, immaterial and incompetent and not proper cross-examination.)

A. They claimed a misrepresentation of facts.

Q. That is, Mr. King claimed that the money had been procured from him and Mr. Mead by misrepresentation?

(Testimony of William H. Rowe.)

(Counsel for complainant interposes the same objection.)

A. Well, things did not exist out here as they expected.

Q. Well, didn't they claim, in this first meeting you had on the morning after Mr. Waterhouse and I arrived, when you and the attorneys of your company, Messrs. McKee & Frost and Mr. Mead and Mr. Baldwin and several of the other directors of your company were present; did not Mr. King there make the statement that he claimed that the money that had been advanced by him and Mr. Mead and Mr. Corwine to the North Alaska Steamship Company, had been procured from them by misrepresentation by the officers of the North Alaska Steamship Company?

(Counsel for complainant interposes same objection.)

Q. (Continuing.) What are the statements that he made; I am not asking you what are the facts; but did not Mr. King make that claim?

A. He made that statement, yes.

Q. And it is not true that there was a row on between your company and its officers and Mr. King, during practically those entire negotiations?

(Counsel for complainant interposes the same objection.)

(Testimony of William H. Rowe.)

A. Mr. King and his associates were the controlling interest of the company indirectly.

Q. In the North Alaska Steamship Company?

A. The Occidental Securities Company owned nearly all the stock of the North Alaska Steamship Company and Mr. King and his associates were the controlling interest of the Occidental Securities Company.

Q. His charge, or statement, however, was that the money by which he had secured that control was procured by misrepresentation of facts by the officers of the two companies?

Mr. KING.—We object to that as incompetent, irrelevant and immaterial, and there is no showing that General Dodge, or anyone representing him, was present there at all, and the further objection that it is not proper cross-examination.

A. He so claimed.

Q. (By Mr. BOGLE.) That was a row in which Mr. Waterhouse was not concerned in any way, and was not mixed up in?

A. I do not think so.

Q. You have stated that Mr. Waterhouse could have communicated with General Dodge or his representative? A. Yes.

Q. Who was his representative, to whom you refer?

(Testimony of William H. Rowe.)

A. Mr. Jennings, who was in his office at No. 1 Broadway, and if he was not there some one else was always there during business hours.

Q. Did you see either General Dodge or any representative of his during the time that Mr. Waterhouse was in New York on that occasion?

A. I did not to my remembrance, I don't remember.

Q. You knew that General Dodge claimed to be a creditor of your company?

A. I understood that General Dodge had been protected by Waterhouse. Mr. Pusey had been here and had fixed it up between him and Waterhouse at the sailing time of the "Garonne."

Q. The papers that had been prepared on that occasion, had been shown to you, or were shown to you while you were in New York on that trip?

A. You mean the mortgages?

Q. Yes.

A. No; they were not; I did not see them.

Q. As a matter of fact, you knew the mortgages had been sent on there?

A. I understood they were there at the time you and Mr. Waterhouse were there.

Q. Who was the secretary of the North Alaska Steamship Company?

(Testimony of William H. Rowe.)

A. I think Mr. Leak, but I am not sure, I could not say now.

Q. I will ask you if J. V. Leak was not the secretary of that company?

A. I cannot say. There are so many companies and so many officers that I cannot remember which was which of the particular company.

Q. The North Alaska Steamship Company was a New York corporation, was it not?

A. Yes.

Q. When was it organized?

A. In the spring of 1904.

Q. For the express purpose of purchasing the "Garonne"?

A. For the purpose of purchasing the "Garonne."

Q. Its main office was in New York city?

A. It was.

Q. Its secretary was in New York city?

A. He was.

Q. And the seal of the company was there?

A. Yes.

Q. And that was the meeting place of its board of directors? A. It was.

Q. Now, Mr. Rowe, is it not a fact that you were informed before Mr. Waterhouse reached New York, that a mortgage which had been prepared

(Testimony of William H. Rowe.)

in Seattle and signed by Mr. Smith before he went north, had been forwarded to the Chase National Bank? A. I so understood.

Q. To be executed by your company?

A. Yes.

Q. By the secretary with his seal, under authority of the board of directors?

A. I so understand it, yes.

Q. Was it ever executed?

(Counsel for complainant objects as irrelevant, immaterial, incompetent and not proper cross-examination.)

A. I believe not.

Q. Why?

(Counsel for complainant interposes the same objection.)

A. Because Mr. King and Mr. Mead, who had undertaken to finance our various companies, refused to allow it to be done.

Q. Was that before Mr. Waterhouse reached New York?

A. That was at the time Mr. Waterhouse was in New York.

Q. Is it not a fact that the mortgage had been there for from two to three weeks prior to that time?

(Testimony of William H. Rowe.)

(Counsel for complainant interposes the same objection.)

A. Yes, for some time before, I should judge.

Q. Now, is it not a fact, Mr. Rowe, that the North Alaska Steamship Company was not able to raise the money to pay those liens existing against the "Garonne" which were to be paid before the mortgage was executed.

(Counsel for complainant objects as irrelevant, immaterial, incompetent and not proper cross-examination.)

A. Unable if the Occidental Securities Company did not do it.

Q. Well, the Occidental Securities Company did not do it?

A. The Occidental Securities Company did not do it, because Mr. King and Mr. Mead refused to do it, who were really the financial men in the Occidental Company.

Q. That was before Mr. Waterhouse reached New York at all?

A. They awaited the return of Mr. Mead who had been sent out here to investigate.

Q. Prior to that time you could not and did not raise the money to pay off those debts, isn't that true?

Mr. KING.—I interpose the same objection to all this line of testimony.

(Testimony of William H. Rowe.)

A. We had up to the sailing of the "Garonne," met payment after payment which had been demanded, and we had supposed that we had paid every debt that there was at the time of the sailing of the "Garonne." We had paid more money than any estimate which had been made by Mr. Waterhouse or Mr. Ferguson, and we supposed that everything was clear, and immediately after we received a wire from Waterhouse demanding, I think, thirteen thousand dollars, and then in a few days he jumped to nineteen thousand dollars, and on that the Occidental Securities Company, or, rather, Mr. King, had sent Mr. Mead, his associate, out here to investigate where this money was going to, and until the return of Mr. Mead, which we awaited, we took no action whatever.

Q. (By Mr. BOGLE.) On his return, it was disclosed that the bills for supplies and repairs on the "Garonne," exclusive of the balance of the purchase price due Mr. Waterhouse, amounted to something over thirty thousand dollars?

A. Something like that.

Q. And that was—

A. (Continuing.) It was something like twenty thousand dollars up to the day that we were in session and learned of the return of the "Garonne," and with that came additional debts.

(Testimony of William H. Rowe.)

Q. When the mortgage was sent on there to be executed, it was with the understanding that your company would pay all of those debts against the "Garonne," except the balance of the purchase price due Waterhouse, before the mortgage would be executed, or the bill of sale executed by Waterhouse to your company?

Mr. KING.—I object to that as irrelevant, immaterial, incompetent and not proper cross-examination, and there is no showing that General Dodge had any knowledge at all of this, or was present at any of those conversations.

A. We expected to pay all legitimate debts, but we had no expectation of any such debts as came in against the boat.

Q. (By Mr. BOGLE.) Who represented the North Alaska Steamship Company in Seattle during the time the "Garonne" was being prepared for her northern trip?

(Counsel for complainant interposes the same objection.)

A. W. H. Ferguson.

Q. What was his official position?

(Counsel for complainant interposes same objection.)

A. Traffic manager.

(Testimony of William H. Rowe.)

Q. He had charge of the purchasing of supplies for the ship, didn't he?

(Counsel for complainant interposes same objection.)

A. I cannot recall his contract with the company, but that was explicitly understood that he should not have.

Q. Do you know whether or not, as a matter of fact, he did have such charge?

(Counsel for complainant interposes same objection.)

A. I have no personal knowledge; being in New York.

Q. You were in New York, then, up to the time of this July meeting? A. Yes.

Q. As a matter of fact, you do not know of your own personal knowledge who represented your company in Seattle in the making of changes and alterations and repairs and betterments on the "Garonne," and in the purchase of supplies?

A. At the time Mr. Waterhouse was in New York in April I think, he demanded that no repairs nor supplies, nor anything should be bought that might become a lien against the boat, without his permission, and it was so given.

Q. But he was not to make the repairs himself?

(Testimony of William H. Rowe.)

A. Under his direction, all of them were to be made.

Q. Wasn't it his demand, Mr. Rowe, that your company, which was buying this boat on, credit, should not incur any liabilities against the boat without his permission?

A. That was what I understood.

Q. That was what he demanded.

A. He demanded that.

Q. He did not undertake to make the repairs himself, did he?

A. He had a man in charge of that repairs, as I understood.

Q. A man in charge of the "Garonne"?

A. A man who oversaw the repairs.

Q. Who?

A. (Continuing.) —and the purchase of the lumber was done by Mr. Waterhouse himself in making those repairs—

Q. How do you know that?

A. Because he wired from New York for them to go ahead over his own signature, to go ahead in fixing the decks.

Q. For who to go ahead?

A. For the contractors who made the bid for the fixing of the decks.

Q. He submitted the bids from the contractor?

(Testimony of William H. Rowe.)

A. We told him to go ahead.

Q. And he refused, prior to that, to permit those repairs to be made, hadn't he?

A. I think so, until we agreed to it. He wanted some understanding as to what should be done, and how he was to do it, and we left it to him, and he immediately wired to—I forget the name of the firm here, to go ahead with the decking of the boat.

Q. Do you know who made the contract with that firm for those repairs? A. I do not.

Q. Hadn't your agent reported—

A. Mr. Ferguson and Mr. Waterhouse were talking the matter over at the time it was brought up before the board of directors in our office in New York.

Q. You understood it was necessary to have a new deck?

(Counsel for complainant objects as irrelevant, immaterial and incompetent.)

A. That was what we understood.

Q. Your company agreed to pay those bills, didn't they? A. They did.

Q. And they agreed to pay all other bills which might be incurred against the ship?

(Counsel for complainant interposes same objection.)

A. Yes, and at the sailing of the boat, we supposed those bills were paid.

(Testimony of William H. Rowe.)

Q. But you had not been out here to know what the bills were?

A. No. Money had been wired to Waterhouse to pay them. All money was wired direct to Waterhouse for repairs, everything excepting a local office that our traffic manager had.

Q. The money that was wired out here was wired to pay specific bills to which he had called your attention by wire? A. Yes.

Q. Mr. Rowe, why didn't you see General Dodge; knowing that he was a creditor of this company and that this mortgage had not been executed during the time of those negotiations in New York, and particularly at the time when you, as a trustee and director, voted to abandon your contract to purchase?

Mr. KING.—I object to the question as irrelevant, immaterial, incompetent, and not showing that the witness was under any obligations whatever to notify General Dodge or to call his attention to it.

Mr. BOGLE.—I do not claim that he was.

A. I understood that Mr. Dodge had been protected by Mr. Pusey, representing him in an arrangement with Waterhouse.

Q. You knew he had not been paid, didn't you?

(Counsel for complainant interposes same objection.)

(Testimony of William H. Rowe.)

A. Yes, I knew he had not been paid the ten thousand dollars.

Q. And you knew whatever protection he got was through that mortgage?

(Counsel for complainant interposes same objection.)

A. I had not seen the mortgage.

Q. I say, you knew whatever protection he got was through that mortgage? A. Yes.

Q. And you knew that that mortgage had never been executed? A. Yes.

Q. And you knew that your company, through its board of trustees, being unable to meet its obligations, for the purchase price abandoned its contract to purchase?

(Counsel for complainant interposes same objection.)

A. Yes, but that Mr. Dodge would be protected with Waterhouse.

Q. How?

A. Because Mr. Waterhouse had entered into an arrangement with Mr. Pusey to do so, I supposed.

Q. There was nothing in your resolution which refers to Dodge in any way.

(Counsel for complainant interposes same objection.)

(Testimony of William H. Rowe.)

A. No, sir.

Q. His name was not mentioned in any of those negotiations, was it?

(Counsel for complainant interposes same objection.)

A. No.

Q. When you say, then, that he was protected, you are simply saying that you understood he was protected?

A. I understood. I did not know.

Q. Who were the attorneys of the North Alaska Steamship Company at that time?

A. McKee & Frost.

Q. Who represented the interest of Mr. King and Mr. Mead? A. Mr. Baldwin.

Q. He was of the firm of Griggs—

A. —Baldwin & Baldwin.

Q. Mr. King is a man who stands high in New York commercial circles, is he?

A. Prominently known, yes.

Q. He is at the head of one of the large firms there, "Calhoun, Robbins & Company."

A. He is one of the firm.

Q. He is the managing partner of that firm.

A. I think so.

Q. And was for many years president of the Merchants' Association of New York?

(Testimony of William H. Rowe.)

A. He was.

Q. And at that time was really the managing director of that association, was he not?

Mr. KING.—It is understood that I object to all this as irrelevant, immaterial and incompetent.

A. I think so.

Q. (By Mr. BOGLE.) Under the conditions which you found existing among your stockholders and in your company; it was impossible for your company to meet the obligations existing against the "Garonne" at the time we were in New York, wasn't it, Mr. Rowe?

A. When Mr. Mead and Mr. King, as members or stockholders in our various companies, turned it down, we had no other resource at that time.

Redirect Examination.

Q. (By Mr. KING.) As a matter of fact, Mr. Rowe, had you any knowledge that anyone, outside of Waterhouse & Company, or Mr. Waterhouse himself, was incurring or had any authority to incur obligations against the "Garonne"?

A. Up to the time of the sailing?

Q. Up to the time of the sailing?

A. I supposed that Mr. Waterhouse was checking up every supply and repairs.

(Testimony of William H. Rowe.)

Q. Did you know anything about any obligations incurred after the sailing on June 2d?

A. I did not.

Q. You say that when King and Mead turned it down, there was nothing further to be done; I wish you would explain what you mean?

A. Mr. King and Mr. Mead had come into the Occidental Securities Company to help finance the various subordinate companies, one of which was the North Alaska Steamship Company, and they had advanced at that time something like thirty-one thousand dollars at the time of the sailing of the boat, and we supposed that we had all the obligations met, or nearly met, which would be required to outfit and run the boat for the first trip, but, as I said, immediately afterwards a demand came from Waterhouse calling for thirteen thousand dollars, and then six thousand dollars immediately after, additional; and they blamed Mr. Leak and myself for having misrepresented facts; and those were indebtedness that we had no idea would come up because estimates had been made by Mr. Ferguson and Mr. Waterhouse to us, what it would require to outfit the boat and what it would cost to make those betterments, and this was in excess of that, and I was at the end of my rope. I submitted the matter to Mr. King and Mr. Mead, and they refused to do

(Testimony of William H. Rowe.)

anything further until they investigated it, and Mr. Mead was sent out here to look into the matter, and on his return Mr. Waterhouse and Mr. Bogle followed immediately after; and that was the meetings that we had in the first of July.

I would add here, for my own protection, that Mr. King and Mr. Mead had positively refused to allow us to sell a dollar's worth of stock except what they took themselves in the Occidental Securities Company, and consequently we had no other means of getting money. That tied my hands to those particular men.

Q. I will ask you one question, which perhaps should have been asked on direct examination: Do you know, or are you acquainted with the value of the "Garonne" at the time Mr. Waterhouse was in New York?

A. With the betterments that we had made, I considered that she was worth one hundred thousand dollars.

Recross-examination.

Q. (By Mr. BOGLE.) You had never seen the ship, had you, Mr. Rowe?

A. Not to make any inspection of her—I had seen her.

(Testimony of William H. Rowe.)

Q. The original contract of purchase by you and your associates was made upon the recommendation of Mr. Ferguson, wasn't it?

A. Mr. Ferguson. Of course, we knew the boat by reputation.

Q. What was the capital stock of the North Alaska Steamship Company?

A. Three hundred thousand dollars.

Q. How much of that was paid up stock?

(Counsel for complainant objects as irrelevant, immaterial and incompetent.)

A. The exact details of the organization of the company is not familiar here with me at the present time.

Q. Is it not a fact that the Occidental Securities Company held all of the stock of the North Alaska Steamship Company?

A. Practically all.

Q. Is it not also true that there was no cash paid into the treasury of the North Alaska Steamship Company for its stock?

(Counsel for complainant interposes same objection.)

A. Very little, if any.

Q. You do not know of any, do you?

A. No. I came under an agreement with the Occidental Securities Company.

(Testimony of William H. Rowe.)

Q. It was organized merely to receive the titles to the steamship "Garonne" when she was paid for?

A. Yes.

Q. And the payments that were made on the "Garonne" were made with moneys that were borrowed either by the North Alaska Steamship Company or the Occidental Securities Company?

A. Or the sale of the Occidental Securities Company's stock.

Q. What was the capital stock of the Occidental Securities Company?

(Counsel for complainant interposes the same objection.)

A. Three million, I think.

Q. How much of that was actually paid in cash?

A. I could not say.

Q. Was any of it paid up in cash?

A. Oh, yes.

Q. You stated that Messrs. King and Mead—

A. —had paid in thirty-one thousand dollars into the Occidental.

Q. How much stock of the Occidental did they receive for that?

(Counsel for complainant interposes the same objection.)

A. I cannot recall now—

Q. I understood you to say—

(Testimony of William H. Rowe.)

A. Quite a bit of it.

Q. I understood you to say that they held the controlling interest in the Occidental Company?

A. I had turned in considerable mining interests and I gave them a certain amount of my own holdings as a bonus.

Q. They held something over a million and a half of the Occidental, didn't they?

(Counsel for complainant interposes same objection.)

A. About a million, I think.

Q. And then they held large blocks of each of the subsidiary companies, that were owned by the Occidental?

(Counsel for complainant interposes same objection.)

A. No, sir, only as they held it through the Occidental.

Q. How much of the stock of the Occidental was issued?

(Counsel for complainant interposes same objection.)

A. Nearly all of it.

Q. Then if King and Mead only had a million of that stock they didn't have a majority?

A. I had a million with some of my friends, and we had entered into a voting arrangement, so that

(Testimony of William H. Rowe.)

they had the control under a certain fixed arrangement with them.

Q. Now, for this million of stock in the Occidental, they paid in thirty-one thousand five hundred dollars? A. They were to pay more—

(Counsel for complainant interposes same objection.)

A. (Continuing) —under the arrangement whereby they received one million dollars of the Occidental Company's stock, which they never lived up to. They had done so up to the time of the sailing of the "Garonne" and had paid in a partial amount; they agreed the amount to be paid in was thirty-one thousand dollars, and they stopped when those additional debts which we had no idea of came up. It was as much a surprise to me as it was to them.

Q. The assets of the Occidental Company consisted of certain mining claims in the Nome district?

A. Yes.

Q. And the contract to purchase the "Garonne"?

(Counsel for complainant objects as irrelevant, immaterial, incompetent and not proper cross-examination.)

A. The assets was the stockholdings that they had in companies that controlled mining claims in Alaska, yes. The Occidental had no claims of its own, simply it was a stockholding company.

(Testimony of William H. Rowe.)

Q. Do you know anything about this indebtedness claim by General Dodge against the North Alaska Steamship Company?

A. Yes, I know the money was advanced.

Q. To whom did he advance the money?

Mr. KING.—Objected to as irrelevant, immaterial, incompetent and not proper cross-examination.

Q. (By Mr. BOGLE.) I will ask you if it is not a fact that he loaned this money to Charles B. Smith?

A. He did, for the purpose of making a payment on the "Garonne," and Mr. Smith agreed to see that he was secured in the purchasing of the boat.

Q. Were you present? A. Well, no.

Q. Then, when you say what Mr. Smith agreed to you are not speaking to any matter of personal knowledge?

A. Mr. Smith was my partner, and came immediately to me after he got the money and brought the money to me.

Q. What did Mr. Smith get in the North Alaska Steamship Company or the Occidental Securities Company, as the equivalent of this money that he borrowed from General Dodge?

(Counsel for complainant interposes the same objection and for the reason that General Dodge was not present and cannot be bound by it.)

(Testimony of William H. Rowe.)

A. He received nothing in the way of stock for that.

Q. How long after this money was received, before it was assumed by the Occidental Securities Company?

(Counsel for complainant interposes the same objection and because it never was assumed by the Occidental Securities Company.)

A. I don't know whether we, as a company, assumed it or not. I do not know just what papers were made out.

Q. Did the North Alaska Steamship Company ever assume it?

(Counsel for complainant interposes the same objection.)

A. I do not recall. Mr. Smith made all the arrangements for that during the time he was in New York before coming west, and just what papers were made out in relation to that I could not say.

Q. Do you remember a telegram, forwarded or sent from New York to Mr. Waterhouse by your company, in which it was stated that the company would give General Dodge as the security for those deferred payments?

(Counsel for complainant objects as irrelevant, immaterial, incompetent and not the best evidence.)

A. I do not recall such a telegram.

(Testimony of William H. Rowe.)

Q. Was there ever such an arrangement with General Dodge?

(Counsel for complainant interposes the same objection.)

A. Not that I know of.

Q. Do you not recall any arrangement of that kind at all, Mr. Rowe?

(Counsel for complainant interposes same objection.)

A. Anything securing him for the payment?

Q. Do you remember that under the contract with Mr. Waterhouse the deferred payments were to be secured in a manner which would be satisfactory to him, outside of the mortgage on the steamer?

A. That was the original arrangement.

Q. Was there ever any arrangement made by you or any officer of your company, with General Dodge, that he would become security for those deferred payments to Mr. Waterhouse?

A. Early in the spring we endeavored to do that.

Q. What was the arrangement which you made to that effect?

A. Mr. Smith, I think, made an effort to have General Dodge secured to assist us in securing those deferred payments.

Q. Was that the time he borrowed the money from him?

(Testimony of William H. Rowe.)

A. I have no positive knowledge of that, because Mr. Smith did all those transactions himself.

Mr. KING.—I move to strike out the answer, if he had no positive knowledge of it.

Q. (By Mr. BOGLE.) But the information of that came to you at the same time the information came that he borrowed money from General Dodge? A. No.

Q. Which occurred first?

A. The loaning of the money. We needed to meet a draft from Waterhouse at a certain hour and we had not got the money at noon time, and Mr. Smith jumped out of the office and was back in a very few minutes with that money.

Q. How much was it? How much was the draft?

A. I think twelve thousand dollars or something like that at that time.

Q. How much was paid on it, do you know?

A. We paid five thousand dollars.

Q. Did you put up any other security for it?

A. Not that I know of.

Q. Did you ever make any further loan?

A. Yes. The total loan was something like fifteen thousand dollars, I think.

Q. Wasn't it twelve?

(Testimony of William H. Rowe.)

A. It was twelve at one time, and we got some more after that and we had some before, I think.

Q. Was not the total twelve?

A. I think the total was between fourteen and fifteen that Smith and I got from time to time from General Dodge.

Q. How much had you borrowed from him?

A. Nothing at all, Mr. Smith had always attended to it.

Q. Was that in connection with this purchase of the "Garonne"? A. Yes.

Q. Now, you say there was twelve or fourteen thousand dollars borrowed in that way?

A. Something like that, yes.

Q. And there were never any payments except the five thousand?

A. Five thousand dollars, that was all.

Q. How was that paid?

A. It was paid out of the thirty-one thousand dollars put in by King and Mead.

Q. Paid at the time you got the money from King and Mead?

A. When we got the first thirty-one thousand dollars, yes.

Q. Don't you recollect, Mr. Rowe, that in addition to that you put up a note in bank as collateral security for that Dodge loan?

(Testimony of William H. Rowe.)

Mr. KING.—We object to that as irrelevant, immaterial, incompetent and not proper cross-examination, and particularly immaterial for the reason that there was an accounting between the North Alaska Company and General Dodge before the ship sailed, in which there was found to be due ten thousand dollars to General Dodge, and Mr. Waterhouse had full notice of this.

A. Do you mean for the ten thousand dollars or for the full amount of the loan?

Q. (By Mr. BOGLE.) The amount of money that was borrowed from General Dodge, whatever it was.

A. Not that I know of; I don't think there was. I think there was small note for five thousand dollars put into the bank, but I have no personal knowledge of that.

Q. What note was that?

A. I do recollect—I will answer that—the payment of the five thousand dollars was made to take up a note that Mr. Smith had put in as security for part of that loan that we had from Dodge. He had secured a note from a woman by the name of Dittmar. He was wanting to make a payment to General Dodge—Mr. Smith—and he had secured this note, but he didn't get it discounted, and he put that

(Testimony of William H. Rowe.)

in instead of the cash, and it was the payment of that note; that was the five thousand dollars which had been put in that we used the money that came from King and Mead for.

Q. What became of the Dittmar note then?

A. I think it was returned to Mrs. Dittmar and she destroyed it, I presume.

Q. Did she pay it?

A. She only loaned that note as a favor to Mr. Smith.

Q. She executed the note for five thousand dollars, did she?

(Counsel for complainant objects as irrelevant, immaterial and incompetent.)

A. Yes, she made the note for five thousand dollars and loaned it to Mr. Smith.

Q. And there was no consideration between her and Mr. Smith?

(Counsel for complainant interposes same objection.)

A. Nothing only the matter of personal friendship.

Q. And then Mr. Smith took the five thousand dollars out of the money advanced by King and Mead and paid that note?

(Counsel for complainant interposes the same objection.)

(Testimony of William H. Rowe.)

A. Paid that note to Mr. Dodge, I think.

Re-redirect.

Q. (By Mr. KING.) Did the Occidental Company have a contract to purchase the "Garonne"?

A. No, sir.

Q. If so, at what price?

A. No, sir, it had no contract.

Q. Was the "Garonne" turned into the Occidental Company at any stated price? A. No.

Q. Mr. Rowe, do you know the reason, was there any reason given why King and Mead refused to advance any further money?

A. Mr. King said—I can't remember the exact words, but it was something like that, it was simply like water going through a sieve, the money that was sent out here; and that they didn't know where they stood; and he said at one time at our first meeting at Baldwin's office—he considered it for a long while as to whether he would go ahead any more, or allow the Occidental Company to—the Occidental Company was, of course, domineered by him at that time—and he positively refused to let me sell stock and raise money any other way, and the only hope I had, of course, was through King and Mead. They had a conference at Baldwin's office, which lasted a long time and they did not send for me until late

(Testimony of William H. Rowe.)

in the afternoon; and they sent for me to come over, and Mr. King finally wanted until the next day until 11 o'clock to decide whether he would go ahead any further and let the Occidental Company have any more money, and the next day at 11 o'clock—

Q. You mean "let the North Alaska Steamship Company have any more money"?

A. Let the North Alaska Steamship Company have more money, or let any of the companies owned by the Occidental. He wanted till 11 o'clock next day to decide what he should do, and we met next day at 11 o'clock at the Merchants' Association's rooms and talked it over at length. And he finally turned it down; he said that he was done.

Q. And then what was done?

A. Then he called Mr. Waterhouse out into another room and they had a talk and finally the meeting came to an end. What they were going to do I did not know. But he told me he would see me later, and the next day I think it was, or within a few days, there was another meeting at Baldwin's office and he told me that he would let me have thirty-one thousand dollars, and he about that time, let me have thirty-one thousand dollars more which was equal to the money he had already put in, to use in my mining proposition up in Alaska, and he would have nothing more to do with the steamship end of it

(Testimony of William H. Rowe.)

at all, and immediately after that they went into a meeting by themselves in which Mr. Waterhouse and Mr. Mead and Mr. King made some arrangement relative to the steamship company.

Q. That was the meeting in which they made the arrangement relative to selling the steamship to the Merchants' & Miners' Company?

A. The Merchants' & Miners' Company did not exist at that time, but they made some arrangement by which the Merchants' & Miners' Company was to be formed and handle the steamship "Garonne," and the Merchants' & Miners' Company was to pay Mr. Waterhouse and Mr. King and his associates. He did that after tying me up completely in such a way that I could not do anything. They would not put in any money and they would not let me sell any of the stock. Even if I could have done it, I was not allowed to.

Q. Have you ever seen or do you know of any statement as to the value at which the steamer "Garonne" was put into the Merchants' & Miners' Company?

A. The Mead Development Company, which is the name of the company that Mr. King and his associates have adopted, I think they, with Mr. Waterhouse, each became half owners in the Merchants' & Miners' Steamship Company. I would not be

(Testimony of William H. Rowe.)

sure of that, but I think that was the understanding.

Q. My question was, if you had ever seen or do you know of any statement as to the value at which the steamer "Garonne" was put into the Merchants' & Miners' Company; any prospectus or anything of the kind?

A. I think one hundred and twenty-five thousand dollars.

Q. Have you seen any prospectus?

A. The Mead Development Company published a statement or prospectus in which they stated the value of the boat to be one hundred and twenty-five thousand dollars.

Mr. BOGLE.—I object to that and move to strike it out as irrelevant and incompetent, and not affecting any issue in this suit.

Q. (By Mr. KING.) What time?

A. Some time last winter, I cannot tell the exact month, but probably February or something like that.

Q. Of this year? A. This year.

Re-recross-examination.

Q. (By Mr. BOGLE.) That Mead Development Company is a company in which you and Mr.

(Testimony of William H. Rowe.)

King and his associates in New York, were connected?

A. I had nothing to do with the Mead Development Company.

Q. It is owned by Mr. King and his associates, then?

A. I mean not in the formation of it, I mean—that is, Mr. King and his associates. I have been employed by them—not as one of the formers.

Q. That is engaged in some mining in Alaska?

A. The Mead Development Company owns stock in the Merchants' & Miners' Company as well.

Q. But the company itself does mining business, is dealing in mines in Alaska? A. Mining.

Q. Now, at this conference you speak of at Mr. Baldwin's office, Mr. Waterhouse was not present, was he? A. Yes.

Q. Was he there? A. Yes.

Q. Is it not a fact, Mr. Rowe, that when you and Mr. King and Mr. McKee, your attorney, met in the Merchants' Association rooms with Mr. Waterhouse and myself the next morning, we were informed that all negotiations were off, and that they would not put up any more money?

A. Yes, that is as the Occidental Securities Company dictated to the North Alaska Company.

(Testimony of William H. Rowe.)

Q. Whatever it was, it was a matter between your companies and not between Mr. Waterhouse and anybody? A. No.

Q. We were simply notified that negotiations were off, and that no money would be raised to pay for the "Garonne"?

A. Yes, as a company, but Mr. King stated in my presence he would see what could be done to help Mr. Waterhouse out of the troubles he was representing he was in to meet those payments.

Q. Mr. Waterhouse was representing that he was in this hole?

A. He was in a very bad hole.

Q. He was having the ship thrown back on his hands with liens of something over thirty thousand dollars immediately payable, existing against it; that was his representation was it not?

A. That was what he represented, yes, sir.

Q. And Mr. King said that he would see if he could help him in any way to meet those obligations?

A. Yes.

Q. And your company then passed its resolution throwing up your option or contract to purchase?

A. Mr. King directed us to hold a meeting, as the only way out of it, after he had a talk with Waterhouse. And they formed—Mr. McKee, I think, as our attorney—formed under him, or with Mr. Bal-

(Testimony of William H. Rowe.)

dwin, or some one else connected with the Mead people a resolution for us to vote on. Mr. McKee had a consultation with Mr. King and his associates; who were present I do not know—and came to us with this resolution framed up for us to vote on.

Q. Neither Mr. Waterhouse nor myself, as his attorney, was present at that time?

A. I do not know.

Q. We were not present when you were there, when any such matter was under consideration, were we?

A. As regards the forming of that resolution?

Q. Is it not a fact that the last conference which you held with Mr. Waterhouse and myself was at the time it was announced that you would not raise any more money, nor undertake to meet the payments on the "Garonne," in the Merchants' Association, on the morning of the last negotiation?

A. After we voted on that resolution, I do not think that I saw Mr. Waterhouse; but the arrangement in which we were to do it, had all been talked over for several days.

Q. The arrangements that you were—

A. That we were to do something of this kind, because of its being directed by Mr. King and Mr. Mead—in the meantime they had been framing up something for the organization of a company—they

(Testimony of William H. Rowe.)

had been holding meetings together at which I was not present—I was given to understand that. At which an arrangement had been formed to go ahead with Mr. Waterhouse and I did not like it at that time, and of course, I could not help myself, and the company was arranged and formed. In order to make the new company amply protected, they framed this resolution and requested us to vote on it.

Q. Mr. Rowe, don't you recollect that at the next to the last meeting that was held, at which Mr. Waterhouse or his attorney was present, the proposition was made to your company, including both the North Alaska Steamship Company and the Occidental Company, that you would raise enough money to pay those liens on the "Garonne," that Mr. Waterhouse would extend his debts for an additional six, twelve and eighteen months, and that whoever furnished that money to pay off those debts then existing against the "Garonne," would have a second security on the ship for those payments; and that that was the proposition that was considered by you and Mr. Mead and all of you, and that you came in the next morning with the announcement that the proposition was turned down and no more money would be raised, do you remember that?

(Testimony of William H. Rowe.)

A. Mr. King said he would not put up any more money.

Q. At that time, isn't that the last meeting that was held as between the North Alaska Steamship Company or the Occidental Company, and Waterhouse or his attorney? A. Possibly so, yes.

Q. And subsequent to that, your board passed this resolution? A. Several days after.

Q. Now Mr. Waterhouse had served your company with notice in writing, one or two days after reaching there, that you must either meet the terms of your contract to purchase by making those payments or he would declare your contract off?

A. I think that notice in writing was made after Mr. King had turned us down.

Q. Wasn't it given two or three days before that?

A. I would not be positive as to that.

Q. And did not you and Mr. McKee come into the meeting that morning, when you turned down this proposition of Waterhouse to extend his payments if you would raise enough money to pay those debts on the boat, with written notification to Mr. Waterhouse that you would not pay the purchase price of that boat, but that you would undertake to hold the boat and Waterhouse liable for all the payments you had made on the boat?

A. I made no such statement.

(Testimony of William H. Rowe.)

Q. Did not Mr. McKee furnish a written letter to us in your presence to that effect?

(Counsel for complainant objects as not the best evidence.)

A. I don't remember that.

Q. You do not remember; did your board of trustees direct any such letter to be given?

A. I do not think so.

Q. (By Mr. KING.) Was General Dodge or anyone representing General Dodge present at all those meetings, which you testified about between the Occidental Company and the Merchants' & Miners' Company, Mr. McKee, Mr. King and Mr. Mead? A. No, sir.

Q. Anybody representing him?

A. No, sir.

Q. As far as you know, did he ever receive any information as to what was done at any of those meetings, that you have been questioned about or testified about?

A. At any of those meetings, the only one would be Mr. Waterhouse himself.

Q. As trustee for General Dodge?

A. As trustee for General Dodge.

Q. But no one else? A. No one else.

Q. Did Mr. Waterhouse at any of those meetings mention the indebtedness of General Dodge in any

(Testimony of William H. Rowe.)

way, that you know of, or seek in any way to protect his interest?

A. I do not think it was mentioned. I do not know that there was any way suggested of protecting him. Something may have been mentioned about him.

Q. (By Mr. BOGLE.) Is General Dodge a stockholder in either of your companies?

A. Very small.

Q. How much stock?

A. I think he has two hundred and fifty shares in the Rowe Alaska Company.

Q. That was one of the Occidental Companies' subsidiary companies?

A. Yes; he holds some stock in the Rowe Alaska, but not control of it.

Q. In the Occidental?

A. That stock was bought and purchased for Mr. Dodge long before this arrangement.

Q. Did he hold any stock in the Occidental Company?

A. He may have, but I am not sure.

Q. Did he hold any of the North Alaska Steamship Company? A. I do not think so, no.

Q. Did he have any arrangement or contract or understanding that he was to have stock in either of those companies? A. Not that I know of.

(Testimony of Frank Walker.)

Q. Had he ever attended a meeting of any of your companies? A. He has not.

(Testimony of witness closed.)

Whereupon it is stipulated and agreed by and between counsel for the respective parties in open court that the witness, William H. Rowe, need not sign the foregoing deposition, and that the same shall be considered of the same force and effect as if signed by said witness.

November 29th, 1905, 10 A. M.

Continuation of proceedings, pursuant to agreement. All parties present as at former hearing.

FRANK WALKER, produced as a witness on the part of the complainant, being first duly cautioned and sworn, testifies as follows:

(Q. (By Mr. KING.) What is your business, Mr. Walker?

A. Marine surveyor and consulting engineer and naval architect.

Q. How long have you been in that business?

A. In this part of the world I have been in that business about six years.

Q. Here on the Sound?

A. On Puget Sound.

Q. Are you acquainted with the steamer "Garonne"? A. Very well, indeed.

(Testimony of Frank Walker.)

Q. Are you acquainted with her construction and general condition about July or August, 1904?

A. Yes, sir, I am well acquainted with the vessel.

Q. What was her condition at that time?

A. She was in a very fair condition.

Q. What was the condition as to her hull?

A. Her hull—her shell-plating was in splendid shape.

Q. Have you had occasion in your business to determine the value of steamers similar to the steamer "Garonne"?

A. Yes, that is part of my business. I valued many vessels on all parts of this coast.

Q. Are you acquainted with the value of the "Garonne"?

A. In the latter part of July or the first part of August, 1904, I could place a value on her, or at any time.

Q. You may state what, in your opinion, her value was at that time?

A. Well, considering—I consider the value of the "Garonne" at that time from eighty-six to ninety—

Q. Did you ever see the "Garonne" previous to her coming to these waters?

A. Yes, I saw the "Garonne" in London.

Q. How old a ship is she?

A. She was built in 1871.

(Testimony of Frank Walker.)

Q. What would it cost to build such a ship now?

A. To build such a ship at the present time it would cost from three hundred and fifty to four hundred thousand dollars.

Q. Well, say at the time she was built?

A. At the time she was built it was in the early part of iron-shipbuilding and it was a very expensively built vessel. It would be very difficult for me to give an estimate of what she cost at that time, as I am not acquainted with the iron market at that time.

Q. She could be built cheaper now than then?

A. Very much.

Q. To duplicate her now would be about—

A. From three hundred and fifty to four hundred thousand dollars.

Cross-examination.

Q. (By Mr. BOGLE.) What ballast has the "Garonne"? A. She had permanent ballast.

Q. Do you mean rock ballast?

A. I mean permanent rock ballast.

Q. Is her hull built on the model of modern vessels?

A. Well, her hull was built, at the time she was built, up-to-date, but at the present day there is different opinions have come up at the present day.

(Testimony of Frank Walker.)

Q. Do you know what her dead-weight carrying capacity is?

A. No. She is about thirty-eight hundred gross tons; and then she has so much of her capacity cut out for passengers at the present time, that it would be hard to determine what her dead-weight carrying capacity is.

Q. Have you never examined her while she was loaded?

A. I have examined her under all conditions, loaded and unloaded.

Q. Is it not a fact that her dead-weight carrying capacity is approximately nine hundred tons?

A. I should say "no"; she would carry far more than that.

Q. Have you ever seen her when she had more dead-weight in her than that?

A. No, because when I have seen her she has been loaded with a cargo of various grades—a measurement cargo.

Q. Then you are guessing as to that, when you say she would carry more than nine hundred tons, dead-weight.

A. I am not guessing at it at all. I know she could carry more than nine hundred tons.

Q. How much more, would you say?

(Testimony of Frank Walker.)

A. The "Garonne" should carry, allowing for the difference in her passenger accommodations, about two thousand tons.

Q. Dead-weight? A. Dead-weight.

Q. That is exclusive of her ballast, is it?

A. That is exclusive of her ballast.

Q. If, as a matter of fact, an actual test has shown that she would not carry to exceed from nine hundred to a thousand tons dead-weight, your estimate of her value would be somewhat affected, wouldn't it?

A. No, sir, it would not affect, in my opinion, the value of the vessel.

Q. You think she is worth just as much whether she would carry two thousand tons or nine hundred tons?

A. That is a very peculiar question to ask. The vessel is a passenger vessel at the present time. If it was purely a freighter it would be a different matter.

Q. The only run she could be employed on on the coast with any chance of profit was the run from Puget Sound to Alaska and St. Michaels, wasn't it?

A. Well, it all depends on the call for the vessel—if there was a passenger trade anywhere.

(Testimony of Frank Walker.)

Q. Is there any other trade she could engage in with a prospect of profit?

A. Well, as I said before, if they could find a passenger trade for her they could operate with a profit.

Q. I did not ask you that. Was there one?

A. It is not my business—I am not in the passenger traffic.

Q. The Nome trade is a combination passenger and freight trade, is it not?

A. Yes, it has a great deal of passenger work and baggage and stores.

Redirect Examination.

Q. (By Mr. KING.) Do you know of the "Garonne" being valued here recently?

A. I know of the "Garonne" being valued at the early part of this year. I could not say what date.

Q. Do you know that as a fact?

A. Yes, I know it as a fact.

Q. Do you know what she was valued at then?

A. I don't know the exact figures. It was in excess of my valuation.

Q. It was in excess of your valuation?

A. Yes, it was in excess of my valuation.

Q. That is, it was in excess of eighty-six thousand dollars.

(Testimony of Frank Walker.)

A. It was in excess of eighty-six thousand dollars.

Q. Do you know how much in excess?

A. No, sir, I am not acquainted with the exact figures.

(Testimony of witness closed.)

Whereupon it is stipulated and agreed by and between the counsel for the respective parties that the witness need not sign the foregoing deposition, but that the same, when transcribed by the stenographer, shall be considered as of the same force and effect as if signed by the said witness.

December 5th, 1905, 10 A. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

JAMES FOWLER, produced as a witness in behalf of complainant, being first duly cautioned and sworn, testifies as follows:

Q. (By Mr. KING.) State your name.

A. James Fowler.

Q. What is your business?

A. Surveyor at the Lloyd's register, and consulting engineer.

Q. Marine engineer? A. Marine engineer.

Q. Are you acquainted with the value of iron and steel steamships? A. Yes, sir.

(Testimony of James Fowler.)

Q. Here in Seattle? A. Yes, sir.

Q. How long have you been in Seattle, Mr. Fowler? A. Twelve months.

Q. How long have you been engaged in the business as marine engineer?

A. Twenty-five years.

Q. And represented Lloyd's for how long?

A. Nine years.

Q. Were you acquainted with the "Garoune" when she was in these waters?

A. Yes, sir.

Q. She is an iron steamship, isn't she?

A. Yes, sir.

Q. Did you have occasion to value her last March?

A. Yes, sir.

Q. For what purpose?

A. Valuation.

Q. To ascertain what she was worth?

A. Yes, sir.

Q. And what was your valuation at that time of the steamer "Garonne"?

A. The value of the hull was $75,000. With her equipment complete, $95,000.

Q. What do you mean by her equipment?

A. Equipment is passenger fittings, such as carpets, bedding, cutlery ware, crockery-ware, tools and so forth.

(Testimony of James Fowler.)

Q. Things which are not attached to the ship?

A. Yes, sir.

Q. Does that include sails or rigging?

A. No, sails and rigging belong to the ship.

Q. Sails and rigging would be included in the $75,000? A. Yes, sir.

Q. And the $20,000 would include furniture and fittings and steward's supplies, and articles of that sort? A. Yes, sir.

Q. You examined the ship carefully before making that valuation? Yes, sir.

Q. Did anyone else assist you in making it?

A. Yes, Mr. Wiley, the superintendent of the Boston Steamship Company.

Q. Was that examination made at the request of Mr. Frank Waterhouse and the Frank Waterhouse Company? A. Yes.

Mr. BOGLE.—That is all.

(Testimony of witness closed.)

Whereupon it is stipulated and agreed by and between counsel for both sides in open court that the signature of the witness to the foregoing deposition is waived, and that the same shall be considered of the same force and effect as if signed by said witness.

W. B. JACKLING, produced as a witness in behalf of complainant, being first duly cautioned and sworn, testifies as follows:

Q. (By Mr. KING.) What is your full name?

A. William B. Jackling.

Q. Where do you live, Mr. Jackling?

A. Seattle.

Q. How long have you lived in Seattle?

A. Since '71 or '72.

Q. 1871? A. Yes.

Q. What is your business, Mr. Jackling?

A. Marine engineer.

Q. How long have you been engaged in that business? A. Twenty-five years.

Q. Are you familiar with the value of iron and steel steam vessels?

A. I think so, yes, sir, to a certain extent.

Q. Did you know the steamer "Garonne" when she was in these waters? A. Yes.

Q. Did you see her at any time in the summer of 1904?

A. Yes, I saw her, but not in the summer of 1904, no.

Q. When did you see her?

A. I saw her in the early part of 1905, and the latter part of 1904.

(Testimony of W. B. Jackling.)

Q. Did you examine her at that time?

A. I was aboard of her in the early spring of 1905 and looked through her with the first assistant engineer.

Q. What was her condition at that time?

A. Fairly good.

Q. What was the condition of her hull?

A. It seemed to me to be fairly good.

Q. And the rest of her equipment?

A. It looked first rate to me.

Q. Are you acquainted with the value of steamers similar to the "Garonne"?

A. To a certain extent, yes, sir.

Q. Are you acquainted with the value of the "Garonne"?

A. Well, to the value I would place on the "Garonne," yes.

Q. What would you say was the value of the "Garonne" at the time you saw her?

A. As she stood here, when I saw her, she was worth from $100,000 to $125,000.

Q. Here in this market?

A. I think so, yes, sir.

Q. That included both the hull and all the equipment?

A. The "Garonne" as she stood, yes, sir.

(Testimony of W. B. Jackling.)

Q. What equipment did she have on at that time?

A. Well, the equipment that she had that I noticed was the engineers' department was fairly well equipped, and I noticed that the balance of the ship was equipped about as the the ordinary steamer is, with bedding and culinary department; it was equipped with dishes and things like that.

Mr. BOGLE.—That is all.

(Testimony of witness closed.)

Whereupon it is stipulated and agreed by and between counsel for the respective parties in open court that witness need not sign the foregoing deposition, but that the same shall be considered as of the same force and effect as if signed by said witness.

FRANK WATERHOUSE, produced as a witness in behalf of complainant, being first duly cautioned and sworn, testified as follows:

Q. (By Mr. KING.) Your name is Frank Waterhouse? A. Yes, sir.

Q. You are the defendant in this action, are you not? A. Yes, sir.

Q. And the Frank Waterhouse Company, incorporated, of which you are the president, is the other defendant? A. Yes.

(Testimony of Frank Waterhouse.)

Q. And you are the president of the Frank Waterhouse Company, incorporated?

A. Yes, sir.

Q. And were, in the summer of 1904?

A. Yes, sir.

Q. Mr. Waterhouse, were you in New York in the latter part of July and the first of August, 1904?

A. No, I was not.

Q. You were not in New York at that time?

A. No.

Q. What time, during the summer of 1904, were you in New York?

A. I was in New York in April, and again in the early part of July.

Q. Well, was that after the "Garonne" got back from Alaska?

A. No, I think not; I am not sure whether it was or not. I think she was away—she certainly was away at Alaska when I reached New York—I don't know whether she arrived back while we were there or not.

Q. What did you go to New York at that time for?

A. I went to New York to try to make a final settlement with the North Alaska Steamship Company for the price of the purchase of the "Garonne."

(Testimony of Frank Waterhouse.)

Q. For the balance due on the purchase price?

A. Yes, for the balance due on the purchase price, and to make a settlement with them, or receive money from them, or try to secure money from them, to pay the "Garonne's" debts.

Q. Previous to that there had been a mortgage on the ship drawn up, and you had it at that time, hadn't you?

A. Why, I do not think I had at that time, no, sir, but there had been a mortgage drawn up.

Q. And was delivered to you, and you sent it on to New York, didn't you? A. Yes, sir.

Q. You did not bring it to New York at that time, you had sent it before that?

A. No, I sent it before; I sent it to the Chase National Bank of New York.

Q. Did you get it at that time?

A. I do not remember, Mr. King, whether I did or not. I cannot find it, and I do not think I did. I cannot find any record of it being returned.

Q. Did you make any arrangement with the North Alaska Steamship Company people?

A. Yes.

Q. What arrangement did you make with them towards paying the money on the ship?

A. Well, they were owing me; when I went to New York they were owing me thirty-seven thou-

(Testimony of Frank Waterhouse.)

sand odd dollars—between thirty-seven and thirty-eight thousand dollars on the purchase price of the steamer, which they could not pay. They had also involved the steamer in the matter of thirty thousand odd dollars' worth of debts which they could not pay. And they agreed to surrender any rights that they might have in the vessel if I would take her back and relieve them from the indebtedness that they had created.

Q. Didn't they make an effort to pay you and to hold the steamer?

A. Oh, they made a great many efforts, yes, but they could not—

Q. How long were you in New York; how long were they dickering about this proposition?

A. You mean in July?

Q. Yes, this time.

A. Well, I think we reached New York about the first of July, and we left there about the 10th or 11th.

Q. When did you—

A. (Continuing.) —or the 9th, somewheres about that.

Q. When did you receive the ultimatum of the North Alaska Steamship Company that they could not pay anything more, and would have to surrender the steamer?

(Testimony of Frank Waterhouse.)

A. Well, we received that on either the 7th or the 8th of July, in writing. They wrote me a letter so stating. (Referring to documents.) I see this letter is dated the 9th of June, but that is a mistake, it was the 9th of July.

Q. After looking at the letter which Mr. Bogle has shown you, and refreshing your memory, can you state the date? A. The 9th of July.

Q. What did you then do with the steamer?

A. We took her back.

Q. And then what did you do with her?

A. We sold her to the—well, the merchants had formed a new company in New York, called the Merchants' & Miners' Steamship Company, and we sold the vessel to the Merchants' & Miners' Steamship Company.

Q. Who formed that company—wasn't it Mr. King? A. Mr. King, Mr. Meade—

Q. Mr. King of "Calhoun & Robbins"?

A. Yes.

Q. And Mr. Meade? A. Yes.

Q. And yourself?

A. Yes, and a number of others that I cannot remember—I do not know all their names. The Meade Development Company was the real stockholder besides myself.

(Testimony of Frank Waterhouse.)

Q. How long after you received the letter of the 9th of July from the North Alaska Steamship Company stating that they had given up all hope of raising the money and keeping the steamer—how long after that was it that you sold her to the Merchants' & Miners' Steamship Company—is that the name?

A. Yes, the Merchants' & Miners' Steamship Company.

Q. Well, how long after?

A. Two or three days after.

Q. Wasn't it immediately after?

A. It was not the same day, nor the next day; it was two or three days.

Q. Hadn't you been in negotiations with Mr. William F. King and Mr. Meade, looking to the formation of this company, and the transfer of the steamer, conditional on the North Alaska Steamship Company falling down in their purchase?

A. I do not think a word had ever been said about it.

Q. Nothing had been said about it?

A. I do not think so.

Q. Then you did not undertake to sell the steamer until after you had received the letter of July 9th?

A. No, sir.

Q. Was not Mr. Meade in Seattle shortly before you left on that trip to New York?

(Testimony of Frank Waterhouse.)

A. Yes, he went with me to New York.

Q. And did you talk it over with him as to this Merchants' & Miners' Steamship Company?

A. I never thought of it.

Q. Or disposing of the steamer to anyone?

A. I never thought of it.

Q. To Mr. King or anyone else?

A. I never suggested it. I never saw Mr. King before I got to New York.

Q. How did the Merchants' & Miners' Steamship Company come to be formed?

A. Well, it came to be formed in this way. Mr. Meade, Mr. King, Mr. W. S. Corwine and some others of their associates had subscribed for a considerable portion of the stock of the Occidental Securities Company, which was the holding company in New York of the North Alaska Steamship Company. I think they had invested somewhere between $25,000 and $35,000 in the stock of the Occidental Securities Company, and their money had been used by the Occidental Securities Company for the purpose of the North Alaska Steamship Company, in making the first payments on the steamship "Garonne."

Q. How do you know all this, Mr. Waterhouse?

A. I know it from the statements of Mr. Meade, and the uncontradicted statements of Mr. Meade and

(Testimony of Frank Waterhouse.)

Mr. King. The whole thing was threshed out in New York with the stockholders of the Occidental Securities Company when Mr. Meade was threatening to send them all to the penitentiary for taking his money under false pretenses.

Q. You were not a stockholder in the Occidental Securities Company. A. No, sir.

Mr. BOGLE.—He had not finished his answer.

Mr. KING.—He has answered as far as I am concerned.

Mr. BOGLE.—You asked him how he came to organize the company.

Q. (By Mr. KING.) State how the company was organized—I want simply to know what you know of your own knowledge.

A. I know this of my own knowledge; Mr. King and Mr. Meade were exceedingly exercised because they were in danger of losing their money that they had invested in the Occidental Securities Company; and they did the best they could while I was in New York, to arrange with the Occidental Securities Company to assist the Occidental Securities Company in paying the balance of this "Garonne" money. They found themselves unable to secure their money, to put any more into that company, and they finally declined to assist them any further.

(Testimony of Frank Waterhouse.)

Now, after the North Alaska Steamship Company had served me notice that they could not complete their contract for the purchase of the "Garonne," they could pay nothing further, and asking me to take the steamer back. I then took the matter up with Mr. King, and suggested to him that if he would pay the debts that the North Alaska Steamship Company had contracted against the "Garonne," I would be willing to take that steamer back and sell to him a half interest in the boat so as to protect him as far as possible in the investment he had made in the Occidental Securities Company; and that was subsequently done with the full knowledge of the Occidental Securities Company and the North Alaska Steamship Company and everybody connected therewith.

Q. What price was the "Garonne" sold at?

A. She was sold to the North Alaska Steamship Company for $85,000.

Q. Eighty-five thousand dollars?

A. Well, I think that is it.

Q. How were you paid?

A. We were to be paid $1,000 on the day that they accepted the steamer.

Q. In cash? A. In cash.

(Testimony of Frank Waterhouse.)

Mr. BOGLE.—Are you inquiring for the sale to the North Alaska Steamship Company or the Merchants' & Miners' Company?

Mr. KING.—I am inquiring for the sale of the "Garonne" to the Merchants' & Miners' Company.

Mr. BOGLE.—Then I think the witness misunderstood you.

The WITNESS.—That is different.

Q. (By Mr. KING.) What price was the "Garonne" sold at to the Merchants' & Miners' Company? A. She was sold for—

Q. I will refresh your memory—you say in the pleadings that she was sold for $67,000.

A. That is right.

Q. Was that true? A. That is right.

Q. Was there any of that cash?

A. Why, there was $30,000.

Q. In cash? A. Yes.

Q. That was to pay the debts against the boat?

A. Yes, sir.

Q. And the balance was in stock?

A. The balance of the—

Q. I mean the $37,000, that was in stock?

A. Yes.

Q. And how much—

(Testimony of Frank Waterhouse.)

A. (Continuing.) That represented my interest; that represented the amount the North Alaska Steamship Company had failed to pay on the steamer.

Q. Did you get $37,000 in stock?

A. My recollection is that for some purpose, the capital stock of the Merchants' & Miners' Steamship Company was fixed at $100,000.

Q. Yes—now, how much of that stock did you get for the interest in the steamer, outside of the $30,000 cash?

A. It was fixed at $100,000. The money that Mr. King paid in, the $30,000—the money that was owing me, the $37,000, was considered to be the indebtedness of the Merchants' & Miners' Steamship Company to Frank Waterhouse & Company. The money that Mr. King put in, the $30,000 additional that he put in, was also considered to be an indebtedness to him of the Merchants' & Miners' Steamship Company, and a mortgage was given by the Merchants' & Miners' Steamship Company jointly to Frank Waterhouse & Company and W. F. King, for $67,000, of which Mr. King had $30,000 and Frank Waterhouse & Company had $37,000 and interest.

(Testimony of Frank Waterhouse.)

Q. And the title to the ship passed to the Merchants' & Miners' Steamship Company?

A. Yes, sir.

Q. Did you receive any stock in the Merchants' & Miners' Steamship Company for the ship?

A. The stock never was issued of the Merchants' & Miners' Steamship Company.

Q. None was issued at all?

A. I do not think that it ever was issued, I do not think so.

Q. Practically, Frank Waterhouse & Company received the steamer back with a mortgage on her to Mr. William F. King of $30,000, and a mortgage on her to Frank Waterhouse & Company themselves, or to you individually?

A. No; it is not so at all. Frank Waterhouse & Company did not receive the steamer back at all. The steamer was sold. Frank Waterhouse & Company had no further interest in the steamer except as their interest in the Merchants' & Miners' Steamship Company.

Q. What was the Occidental Securities Company's interest in the Merchants' & Miners' Steamship Company—you state in your pleadings that you received stock in the Merchants' & Miners' Steamship Company; now you say you did not—and that there was no stock issued.

(Testimony of Frank Waterhouse.)

A. I said the stock was not issued. If the stock had ever been issued I would have received it.

Q. How much stock would you have received if the stock had been ever issued, outside of the mortgage?

A. I think our share was $62,500.

Q. Out of the $100,000 capital stock?

A. Out of the $100,000 capital stock.

Q. Now, the Merchants' & Miners' Steamship Company was incorporated after you got to New York on that trip in July?

A. Yes. After we left New York for Seattle.

Q. Do you know who would have got the remainder of the stock of the Merchants' & Miners' Steamship Company, if it had been issued?

A. Yes, the Meade Development Company.

Q. Who did it consist of?

A. I think it consisted of those men—Mr. King and his associates, that invested the money in the Occidental Securities Company, five or six of them.

Q. As a matter of fact, Frank Waterhouse & Company got for the steamer "Garonne" $30,000 in cash to pay off the indebtedness.

A. No; the Merchants' & Miners' Steamship Company got the $30,000.

Q. The Merchants' & Miners' Steamship Company did not owe anybody anything, did they?

(Testimony of Frank Waterhouse.)

A. The Merchants' & Miners' Steamship Company agreed to pay the debts of the North Alaska Steamship Company on the boat, and they received the money and paid the debts.

Q. Then they received for the boat—there was paid for the boat, whether you received it or not, $30,000 which went to pay the claims on the boat.

A. Yes.

Q. That's right? A. Yes, sir.

Q. And in addition to that there was a mortgage of $37,000 on the boat.

A. There was a mortgage of $67,000.

Q. Of the $67,000, $30,000 was cash to pay the claims on the boat; now, who held the other $37,000?

A. Frank Waterhouse & Company.

Q. And Frank Waterhouse & Company also held $33,000 worth of stock in the Merchants' & Miners' Steamship Company.

A. It would have held that if it ever had been worth anything or ever had been issued.

Q. If it ever had been issued?

A. As a matter of fact that stock was so much water; it represented nothing.

Q. You became president of the Merchants' & Miners' Steamship Company? A. Yes, sir.

(Testimony of Frank Waterhouse.)

Q. And you are president yet?

A. The company is disincorporated.

Q. You entered the "Garonne" in the custom house, as owned by the Merchants' & Miners' Steamship Company, with yourself as president here in Seattle?

A. No, I think that she is not entered here in Seattle—she is entered in New York.

Q. Now, I want to be perfectly fair with you—

A. She was registered in New York.

Q. Now, I hand you that (showing paper to witness) and I will ask you what it is—and I would just as soon strike your answer which you have just given out if you find you are mistaken.

Mr. BOGLE.—I think I can explain all this better than Mr. Waterhouse can, because it all passed through my office.

A. (By the WITNESS.) I do not know anything about it; I know she was registered in the state of New York.

Q. (By Mr. KING.) I hand you plaintiff's identification No. 8, and I will ask you what it is.

A. It says that it is a copy of the certificate of registry.

Q. The register of the steamer "Garonne"?

A. Yes, sir, the steamer "Garonne" of New York.

(Testimony of Frank Waterhouse.)

Q. Turn over, and see whether it is duly certified on the back, by the customs officials.

A. Yes, sir.

Q. That says that you are the president of the Merchants' & Miners' Steamship Company?

A. Yes, sir.

Q. And that the "Garonne" is registered in their name? A. Yes, sir.

Q. And from the time that the "Garonne" was sold to the Merchants' & Miners' Steamship Company, up to the time she left these waters, she was in your control as president of that steamship company, wasn't she? A. Yes, sir.

Q. Do you recollect when the "Garonne" left here to sail for Alaska on June 2d, 1904?

A. I recollect when she sailed, I do not remember whether it was the 1st or 2d of June.

Mr. BOGLE.—It was either the 2d or 3d of June.

Q. (By Mr. KING.) From the time she sailed until she was surrendered to you by the North Alaska Steamship Company, had you received any money from the steamer, or from the North Alaska Steamship Company?

A. From the time she sailed?

Q. Yes. A. I think we had.

(Testimony of Frank Waterhouse.)

Q. And was that money credited up against the balance that was due on the purchase price?

A. Some of it, yes, sir.

Q. How much did you receive?

A. I could not tell you.

Q. Didn't you keep any account of it?

A. Certainly, but I cannot tell from memory.

Q. Have you got your book here?

A. Do you mean how much did we receive after she sailed—altogether do you mean?

Q. No; what I mean is this: You have stated in your answer the different sums of money which you received in part payment of the "Garonne"; you received something like $47,000, didn't you?

A. Yes.

Q. Now, what I want to know is, did you receive any freight money, or anything of that kind after she sailed—was there any money remitted down to you from Alaska? A. No, sir.

Q. From any source, did you receive any money?

A. Yes, we did receive money after she sailed. We received the passenger money, north bound, from the agents here.

Q. You were the agent—Frank Waterhouse & Company were the agents?

A. Yes, but there were a lot of tickets sold by the North Alaska Steamship Company itself; that

(Testimony of Frank Waterhouse.)

money was turned into us; there was some tickets sold by E. E. Caine and that money was turned into us; and that money we credited on account of the North Alaska Steamship Company, either on the purchase or on their debt account with the boat, I forget which; but we received nothing after the steamer—now, I want to make myself perfectly plain here.

Q. And I want you to.

A. (Continuing.) We received nothing from collections in Alaska. We received no collections except those that were made here—paid in here before the steamer sailed. They may have come twenty-four hours after she sailed or two days after she sailed, but they were all the result of receipts here in Seattle. We never received anything from Alaska.

Q. Didn't you receive some freight money?

A. From Alaska?

Q. Yes. A. No.

Q. Didn't you receive $500 or something like that amount?

A. Not that I have any knowledge of.

Q. Then the only money which you did receive was from the sale of passenger tickets here in Seattle. A. Yes, northbound.

(Testimony of Frank Waterhouse.)

Q. And no freight money at all?

A. Not a dollar that I know of. I would be very glad to look that up, and if we did receive anything from any source in Alaska I will advise you of it.

Q. Now, you represented the steamer as agents, previous to her sailing to Alaska on that trip?

A. Yes.

Q. And advertised her as sailing for the North Alaska Steamship Company with you as agents, in the daily papers. A. Yes, sir.

Q. When you were in New York, in negotiation with the North Alaska Steamship Company, did you produce or show them any vouchers for this indebtedness?

A. Why, I think we took with us all the bills that we had received up to that time; I am not very sure about that.

Q. If you had not the bills, Mr. Waterhouse, how did you ascertain the amount that was due on the steamer?

A. We knew the amount that was due on the steamer before I left for New York, and after I got to New York we wired our treasurer and asked him to telegraph what bills had subsequently come in, and what up to that time was the amount of the North Alaska Steamship Company's debt against that steamer—what was the amount of the bills that

(Testimony of Frank Waterhouse.)

they had incurred against the steamer and not paid, and he replied to that—I have his telegram.

Q. And that is how you made up the amount that was due on the steamer.

A. Yes.

Q. Were those debts liens on the steamer?

A. Every one of them. I could not say every one of them, but nearly all of them. I think every one of them was, except commissions that were due Frank Waterhouse & Company and commissions due E. E. Caine. I think everything else was—I don't know whether they are maritime liens or not—everything else was.

Q. As agents for the steamer, you received a commission for the sale of tickets?

A. Yes, we received commissions.

Q. Frank Waterhouse & Company did?

A. Yes; we had a contract with the North Alaska Steamship Company at the time they purchased the steamer.

Q. Have you got any of those vouchers here?

A. I have a statement showing the bills that were paid with the money that was received in New York, with the $30,000 that Mr. King and his associates paid in. I have not had an opportunity, as our treasurer has been ill, and I did not have the time

(Testimony of Frank Waterhouse.)

to get these until this morning (showing), There it commences, at July 19, and it runs right down there. There is almost $30,000 there; and there are two or three thousand dollars that we had advanced money for, that appear in our books, before I made the arrangements in New York—bills that had to be paid, labor bills and things of that kind. Of course, we have all the vouchers for every dollar we spent on their account.

Q. You say you have got vouchers for all these?

A. We have got vouchers for every cent we ever expended on behalf of any company we ever represented.

Q. This page 20 of your ledger represents the account against the steamer "Garonne"?

A. That represents the indebtedness of the North Alaska Steamship Company.

Q. To Frank Waterhouse & Company?

A. No, to the steamer "Garonne," on July 19, 1904.

Q. And this credit here of $30,000, is the $30,000 received from the Merchants' & Miners' Steamship Company? A. Yes, sir.

Q. And these are the expenditures on it?

A. Yes; the $30,000 was the money received from Mr. King and his associates, and that is the way the money was spent.

(Testimony of Frank Waterhouse.)

Q. You only received one $30,000?

A. That is all. There are some prior expenses to that. These are the last expenses. There are some three or four thousand dollars, as I say, that appear in the books of the North Alaska Steamship Company. We had advanced money for them. That does not quite make up the $30,000. As a matter of fact, there was some $32,000 or $33,000, or possibly $34,000 of debts at that time.

Q. Why is the balance not in here?

A. Well, the reason for that I think is this. Our treasurer can explain it to you, but I think the reason is this—

Q. We do not care for the reason unless you know. You can get the treasurer here if he knows.

Mr. KING.—I would like to offer this page No. 20 in evidence, of the Merchants' & Miners' Steamship Company's ledger, and ask to have it be marked as an exhibit. We will substitute a typewritten copy to be marked as exhibit No. 9.

(Document marked Complainant's Exhibit No. 9.)

Q. You have none of these vouchers here?

A. Not here.

Q. For these expenditures?

A. We have them in Seattle.

(Testimony of Frank Waterhouse.)

Q. But not in this hearing?

A. No.

Q. Referring to this Complainant's Exhibit No. 9, I will call your attention to the item of July 20th of $ 2,036.07, and I will ask you what that is.

A. That is 5% commission.

Q. Just read it.

A. (Reading.) 5% commission on "Garonne" voyage No. 1, earnings.

Q. Frank Waterhouse & Company?

A. Yes, sir.

Q. That was paid to Frank Waterhouse & Company, incorporated? A. Yes, sir.

Q. What is the next item, on July 21st of $597.27?

A. Balance 2½% of 10% commission.

Q. Paid to whom?

A. Frank Waterhouse & Company, incorporated.

Mr. KING.—At this time, if there is no objection, I would like to put complainant's identification No. 8 in evidence.

(Document received in evidence and marked Complainant's Exhibit No. 8.)

Q. On July 9th, when you received word from the North Alaska Steamship Company that they practically threw up their contract on the "Garonne," where was the boat then, do you know?

(Testimony of Frank Waterhouse.)

A. I do not know.

Q. Hadn't she returned to Seattle?

A. I do not remember.

Q. What is your best recollection of when she did return to Seattle?

A. I have not the faintest idea—I haven't got the least idea.

Q. But you say you think it was two or three days after July 9th, 1904, before you consummated your sale with the Merchants' & Miners' Steamship Company?

A. Well, I would know if I knew what day of the week July 9th was, I think I could tell exactly what day of the month—it was either two or three days after.

Q. During that time, did you make any effort to sell the steamer to anyone else?

A. No. There was no use making any effort. I had been trying to sell this steamer for two years before, and had exhausted the world.

Mr. KING.—I move to strike that out as not responsive to the question.

Q. Whereabouts in New York did these negotiations take place?

A. They took place in the office of the Occidental Securities Company, at the Merchants' Association,

(Testimony of Frank Waterhouse.)

at Griggs, Baldwin & Baldwin, attorneys, at McKee & Frost, attorneys, and at the Holland House.

Q. Now, give the locations of some of those places in New York which you have testified about —where is Griggs, Baldwin & Baldwin's office?

A. On Pine street.

Q. And where is the Merchants' Association?

A. On Broadway.

Q. Whereabouts on Boardway?

A. I think it is No. 240.

Q. The lower part of Broadway?

A. Yes.

Q. Where is McKee & Frost's office?

A. No. 48 Broadway, or 42—42, I think it is.

Q. That is still very low down on Broadway?

A. Yes.

Q. And where is the Holland House?

A. On Fifth Avenue.

Q. Whereabouts on Fifth Avenue?

A. Fifth Avenue and 28th Street, I think.

Q. You are pretty well acquainted in New York?

A. Fairly.

Q. You have been there frequently.

A. I have been there four or five times a year.

Q. The numbering of the buildings in Broadway is consecutive, is it not; it is not like the numbering in Seattle, by blocks?

(Testimony of Frank Waterhouse.)

A. No, it is consecutive, I believe.

Q. So that No. 28 Broadway—

A. 42 Broadway I said.

Q. The office at 42 Broadway, from the way that Broadway is numbered, as you know, would be only twenty-one doors from No. 1 Broadway.

A. I said 48 Broadway.

Q. Would be twenty-eight doors from No. 1 Broadway? A. I do not know, Mr. King.

Q. Is it not a fact that the numbers run alternately, the even numbers on one side of the street, and the odd numbers on the other, and that they run up consecutively? A. I believe they do.

Q. Then No. 48 would be twenty-four doors from No. 1, but on the opposite side of the street—you know that, don't you?

A. I should think so, but I don't know it.

Mr. KING.—That is all.

Mr. BOGLE.—I have no cross-examination of this witness.

Mr. KING.—I would not like to close my case now; if there is no objection. I will say that I have no more witnesses, but I would like to read over this testimony before I close, if there is no objection.

Mr. BOGLE.—There is no objection.

(Testimony of witness closed.)

(Testimony of Frank Waterhouse.)

Whereupon it is stipulated and agreed by and between attorneys for both sides in open court that the witness need not sign the foregoing deposition, but that the same shall be considered of the same force and effect as if signed by said witness.

December 13, 1905, 4 o'clock P. M.

Continuation of proceedings pursuant to agreement. All parties present as at former hearing.

Mr. KING.—At this time the complainant desires to offer in evidence, as Complainant's Exhibit No. 9, the copy of page 20 of the Merchants' & Miners' Steamship Company's ledger that was furnished by the defendant.

(The copy above referred to is received in evidence and marked "Complainant's Exhibit No. 9.")

FRANK WATERHOUSE, recalled, testifies as follows:

Q. (Mr. KING.) Mr. Waterhouse, the mortgage you spoke of when you testified before as having been sent to the Chase National Bank, was the mortgage in which General Dodge was protected for his secondary interest of $10,000.

A. I believe it was.

Q. Now, you stated at your previous examination that the stock in the Merchants' & Miners'

(Testimony of Frank Waterhouse.)

Steamship Company, or any stock, if it had been issued, was practically valueless? A. Yes.

Q. Didn't the company have any assets?

A. No, they had no assets, except the steamer "Garonne."

Q. And that asset was subject to a mortgage of $67,000?

A. No. I made a mistake in reference to that when I testified the other day. I find there was no mortgage given at all.

Q. There was no mortgage given?

A. No.

Q. And how was the $30,000 secured then?

A. The Merchants' & Miners' Steamship Company agreed to consider the $30,000 paid in by Mr. King and his associates, and the $37,500, or the thirty-seven thousand and odd dollars which was the balance due Frank Waterhouse & Company by the North Alaska Steamship Company—the unpaid balance due on the purchase price of the "Garonne" —as a debt of the Merchants' & Miners' Steamship Company to us. Now, the Merchants' & Miners' Steamship Company was capitalized for $167,000. The reason for that was this: Mr. King and his associates insisted that they should have an equal interest with us, or with Frank Waterhouse & Company, in the management of the Merchants' &

(Testimony of Frank Waterhouse.)

Miners' Steamship Company; that they should have equal voting power; and in order to accomplish that, it was suggested by Mr. King's attorneys and agreed to by mine, that the capital stock of the Merchants' & Miners' Steamship Company should be $100,000, which should be divided equally between Mr. King and his associates and myself, and that the amount of $37,000 due me, and the amount of $30,000 which Mr. King advanced to pay off the indebtedness against the "Garonne," should be considered as an indebtedness of the Merchants' & Miners' Steamship Company to us; so, the capital stock was not $167,000, but $100,000, I believe, with an indebtedness of sixty-seven thousand and odd dollars.

Q. Are you very positive that that indebtedness was not secured by a mortgage on the vessel?

A. Well, I am not absolutely positive, but I do not think it was. I have no recollection of it.

Q. I have here a statement from the Meade Development Company, in which it states, amongst their holdings; "See mortgage on the steamer 'Garonne,' $30,000, security for cash advanced to the Merchants' & Miners' Steamship Company; total mortgage on vessel $67,000"; are you prepared to say that that statement is incorrect?

A. I am not prepared to say it is incorrect; I think it is, but I do not remember; I never have seen

(Testimony of Frank Waterhouse.)

the mortgage that I know of, and I do not remember one ever being made.

Q. Were those parties, who are represented as having been paid by Complainant's Exhibit No. 9, pressing you for payment at that time you were in New York?

A. No, sir; we are not in the habit of being pressed for payment, because we always pay our bills as soon as they are rendered.

Q. As a matter of fact, the "Garonne" was put into the Merchants' & Miners' Steamship Company for $100,000, wasn't it?

A. No, I do not think so.

Q. What price was it put in at?

A. I think it was put in at $67,000, which was made up of the $37,000 due me and the $30,000 that was advanced by Mr. King and his associates.

Q. Then the Merchants' & Miners' Steamship Company, if there was no mortgage, was indebted to Mr. King for $30,000, and to you for $67,000.

A. To me for $37,000.

Q. That is, if there was no mortgage?

A. If there was, they were indebted to us just the same.

Q. And in addition to that, outside of that, you received $63,000, or you would have received $63,000

(Testimony of Frank Waterhouse.)

worth of stock of the Merchants' & Miners' Steamship Company? A. No, I would not.

Q. How much stock would you have received of the Merchants' & Miners' Steamship Company?

A. I would have received $50,000. Of course that stock had no value, and it was just arranged for the purpose of arranging an equal management —an equal share in the management between Mr. King and his associates and myself.

Q. Was the "Garonne" insured for the benefit of yourself and Mr. King and his associates?

A. It was insured for the benefit of the Merchants' & Miners' Steamship Company.

Q. Do you know what her insurance was?

A. No.

Q. Have you any idea? A. No.

Q. Do you know whether it was more or less than $100,000? A. I do not remember.

Q. Can you ascertain? A. Yes.

Q. Will you do so, please? A. Gladly.

Q. Was there any of this indebtedness, which was set out in Complainant's Exhibit No. 9, which is page 20 of the Merchants' & Miners' Steamship Company's ledger, incurred after Mr. Pusey was in Seattle? A. I do not know.

Q. Did you call Mr. Pusey's attention, when he was in Seattle, to any indebtedness against the com-

(Testimony of Frank Waterhouse.)

pany at that time, other than the $37,000 due on the purchase price? A. Yes.

Q. What indebtedness did you call his attention to?

A. I do not recollect, except that he was told that there was a large indebtedness to be paid. We did not know at the time what the indebtedness was, because we had not received the accounts either from the creditors themselves or a statement of them from the North Alaska Steamship Company.

Q. You never gave him any amount?

A. No; but he thoroughly understood, and was informed, that there was a large indebtedness to be taken care of.

Q. I call your attention to a bill from the Commercial Street Boiler Works, being the first item on exhibit No. 9, and I will ask you if that was work done on the "Garonne"? A. Yes, sir.

Q. By your order? A. No.

Q. By whose order?

A. By the order of the North Alaska Steamship Company.

Q. Did you represent the North Alaska Steamship Company in giving the order?

A. No, sir, I had nothing to do with it.

Q. Did you O. K. it?

(Testimony of Frank Waterhouse.)

A. Not that I am aware of (examines document). No, sir.

Q. Didn't you have an agreement with the North Alaska Steamship Company that no work was to be done, and no indebtedness was to be incurred against the ship without your sanction?

A. Yes, sir.

Q. Was this incurred without your sanction?

A. Yes, a great deal of it was.

Q. When did you first learn of this?

A. Subsequent to the June 1st of that year, 1904.

Q. I now hand you a bill of Frye-Bruhn & Company, being the second item there, and I will ask you whether you know whether that was furnished the "Garonne"? A. Yes, sir.

Q. How do you know it?

A. Because it is O K-ed by their steward and receipted for by him.

Q. Was that furnished with your sanction?

A. I do not know but that we had knowledge that this order was placed. We might have placed the order for them ourselves—I do not remember. Frank Waterhouse & Company were acting as their agents.

Q. That is what I understood.

A. (Continuing.) —and if we ordered anything of this kind it was ordered on the order of their man-

(Testimony of Frank Waterhouse.)

ager here. Nothing was bought except on the order of their manager, for them.

Q. I understood you to say that the first bill you knew nothing about.

A. I have no personal knowledge of it at all.

Q. Are you not their manager?

A. No, sir. Mr. Ferguson was their manager. I was their agent. They had a manager here during all that time, a man in charge of the business.

Q. Did Mr. Ferguson have any authority from you to incur indebtedness against the "Garonne"?

A. Such items as we knew of—

Q. Is that your answer?

A. (Continuing.) —We were willing he should incur. I cannot tell you. I cannot go through that thing and tell you all the items we had knowledge of, because I haven't the slightest recollection except one or two cases.

Q. You say you cannot tell anything about what items, notwithstanding the fact that you say there was an agreement entered into between you, that no indebtedness should be incurred on the steamer without your knowledge and consent.

A. Yes, sir. That agreement was violated by them.

Q. I want to find out on what particular bills that agreement was violated?

(Testimony of Frank Waterhouse.)

A. I cannot say.

Q. Then, for all you know, all these bills may have had your consent.

A. I know they had not, for the reason that the indebtedness—after I left for New York—the indebtedness was increased from something like $15,000 or $16,000, the amount of bills we had at that time, to over $32,000.

Mr. BOGLE.—Do you mean the indebtedness was increased, or that bills came in?

A. Bills came in that we had no knowledge of.

Q. For debts incurred prior to that, was it?

A. Yes, sir.

Q. (Mr. KING.) Now, I will ask you to look at this Kilbourne & Clark bill and tell me if you knew of that before it was incurred?

A. I do not remember it at all.

Q. It was work done on the "Garonne," was it not? A. Yes, sir.

Q. Could you tell whether it was done prior to or subsequent to June 2d, by looking at the bill?

A. No. There is nothing there to indicate when it was done. It must have been done prior, because the bill is rendered on June 2d.

Q. It was for overhauling the electrical system on the ship.

(Testimony of Frank Waterhouse.)

A. It looks like it.

Q. Do you know anything about the next item of King & Winge?

A. I do not know anything about any of these things personally—I cannot tell you anything about it. It was work on the "Garonne" evidently.

Q. That is work done on the "Garonne," but you cannot tell whether that bill amounting to $2,725.60, was incurred with or without your sanction.

A. I can't remember now.

Q. What about McCabe & Hamilton, stevedores?

A. That was for loading the ship.

Q. Was that incurred with your sanction?

A. I knew they were employing stevedores to load the ship, if that is what you mean.

Q. I would like you to answer my question, please.

A. Well, I cannot give you any more of an answer. I knew that the firm of McCabe & Hamilton were working there, but I do not know what the bill was or what hours they worked or anything of the kind.

Q. You had ample opportunity to protect yourself, and I want to find out to what extent you did it. Do you know anything about the bill of the South Prairie Coal Company for $503.70—do you know whether that work was done on the ship?

(Testimony of Frank Waterhouse.)

A. No, it is evidently coal furnished the steamer by the South Prairie Coal Company.

Q. But you only know that by looking at the bill?

A. That is all.

Q. I have here a bill dated July 20, 1904 from Frank Waterhouse & Company, incorporated, against the North Alaska Steamship Company, which is included under date of July 20th, in the Complainant's Exhibit No. 9, and it is for commission on $40,721.43. Did Frank Waterhouse & Company receive that money? A. Yes, sir.

Mr. BOGLE.—Which money do you mean?

Mr. KING.—$40,721.43.

A. (Continuing.) Did we receive that, did you say?

Q. Yes.

A. I do not know whether they did or not.

Q. Then why did you charge commission on it?

A. Because the North Alaska Steamship Company made a contract with Frank Waterhouse & Company that the latter should act as their general agents in securing cargo and passengers for the steamer "Garonne," for which service they were to be paid a commission of 5% on the gross earnings of the steamer "Garonne," which is the usual rate of commission.

(Testimony of Frank Waterhouse.)

Q. Then, none of this money came through your office? A. To us?

Q. The $40,000.

A. Undoubtedly some of it did; what part of it I cannot say.

Q. You cannot say?

A. No, I do not remember.

Q. Have you any means of finding out?

A. Certainly. Maybe, perhaps, all of it did.

Q. If any of the money did come to your office, what was done with it?

A. Turned in to the cashier.

Q. What was done with it in reference to the North Alaska Steamship Company?

A. It was applied on the bills of the North Alaska Steamship Company.

Q. Applied on the bills? A. Yes, sir.

Q. And applied on their indebtedness to you—any of it.

A. I think there was, yes, sir, I do not know what amount.

Q. You are not prepared to say that this whole $40,721.43, did not go through your office, which you charged commission on?

A. That it did not?

Q. Yes.

A. Do you mean that it never reached our office?

(Testimony of Frank Waterhouse.)

Q. No; I mean just exactly what I said; that it did not go through your office.

A. I don't understand your question.

(Question repeated to the witness.)

A. The North Alaska Steamship Company had its own office in Seattle. It was selling—

Mr. KING.—Wait a moment—I asked for a categorical answer to my question.

The WITNESS.—I cannot give you one then. You do not ask a question which I can answer categorically.

Mr. BOGLE.—I think he has the right to answer the question.

The MASTER.—Complete your answer.

A. (By the Witness—Continuing.) The North Alaska Steamship Company had an office; retained an office in the city of Seattle, in which it engaged freight and received the payments, and the charges on the same, and for the sale of passenger tickets, in which it received the proceeds of the sale of those tickets. Now, a portion of this $40,000 was paid in through that office, and possibly all of it was subsequently turned into our office, but what part of it, or if all of it, I cannot say; I do not remember.

Q. The question I asked you was—you are not

(Testimony of Frank Waterhouse.)

prepared to say that this whole $40,721.43 did not go through your office, which you charged commission on; or, can you by reference to the books of Frank Waterhouse & Company, incorporated, ascertain how much of it passed through your office, and how much did not?

A. I do not know whether I can or not.

Q. Then, do I understand you that you wish the record to show that you kept no account of this—Frank Waterhouse & Company?

A. I cannot say whether we kept the books of the North Alaska Steamship at that time, or whether they were being kept in their own office.

Q. Do I understand you then, that none of this $40,000 went through the books of Frank Waterhouse & Company, incorporated?

A. No, sir, I do not think it did.

Q. It did not?

A. I do not think it did; unless, after it was paid over by the North Alaska Steamship Company to us as a payment on the purchase price of the "Garonne," if any part of it was so paid, then it would appear in the books, that part that was so paid.

Q. Where are the books of the North Alaska Steamship Company, have you got them?

A. I think the books are in New York.

Q. They are not here?

(Testimony of Frank Waterhouse.)

A. I do not think so.

Q. You have not got them?

A. I do not know; if we have you are very welcome to them.

Q. Do I understand you that on money received by the North Alaska Steamship Company on the "Garonne" that was not received by or through your office, and never passed through Waterhouse & Company, incorporated, that nevertheless, you got a commission of 5% on it?

A. We got a commission of 5% on the gross earnings of the steamer from the money—wherever the money passed through, whether it was our office or their office.

Q. That was what I asked you.

A. Yes, sir.

Q. Then, if a part of this money was received by the North Alaska Steamship Company direct, and used by them or appropriated by them in any way, you would, nevertheless, receive a commission of 5%, if it was on the earnings of the "Garonne"? A. Yes, sir.

Q. But at the same time you do not known how much of the $40,000 passed through the office of Frank Waterhouse & Company, and how much did not? A. No, sir.

(Testimony of Frank Waterhouse.)

Q. But you do know that any that did, was applied by you in payment of either the indebtedness of the North Alaska Steamship Company to you or in the payment of bills, is that right?

A. Yes, sir.

Q. Now, I have here a bill, shown on exhibit No. 9, of July 21st, 1904; the North Alaska Steamship Company to Frank Waterhouse & Company; this is 2½% on disbursements; the disbursements given at $32,578.13, and the 2½% commission at $814.45. Was that for money disbursed by Frank Waterhouse & Company on account of the North Alaska Steamship Company? A. Yes, sir.

Q. Was there an account of that kept by Frank Waterhouse & Company?

A. An account of the commissions?

Q. No, sir; an account of those disbursements?

A. Yes.

Q. Do you know what those disbursements were for? A. No, sir.

Q. Can you ascertain from your books?

A. Yes, I can send our cashier down here and let him give you all the information you want. I did not keep those books.

Q. How did you receive this money; from what sources—this $32,578.13? A. I do not know.

Q. Do your books show? A. Certainly.

(Testimony of Frank Waterhouse.)

Q. Do you know anything about this bill of the Western Union Telegraph Company for $64.66?

A. No, sir.

Q. You do not know whether it was for telegrams?

A. It was for telegrams, evidently.

Q. You do not know anything more than what the bill shows? A. No, sir.

Q. I have here a bill of Frank Waterhouse & Company against the North Alaska Steamship Company of June 14th, 1904, for proportion of insurance from February 14 to May 30, on policy for $75,000 on steamer "Garonne," three and a half months' premium, $382.83 (showing); that was insurance at that time on the "Garonne," was it?

A. It was the insurance from the time they bought her up to this time—from the time the North Alaska Steamship Company bought the steamer from us.

Q. That insurance was negotiated through the office of Frank Waterhouse & Company?

A. It was negotiated months before; it was a year's insurance; taken out long before that time.

Q. It was taken out through your office?

A. Yes.

Q. Was there any other insurance on the boat at that time besides that? A. I could not say.

(Testimony of Frank Waterhouse.)

Q. In addition to that?

A. I do not remember.

Q. You would not say there was not?

A. No, sir.

Q. I now hand you a number of bills from Sunde & Erland and aggregating, according to exhibit No. 9, $429.83, and I will ask you whether you know whether or not those were incurred with your knowledge and consent for the steamer "Garonne" (showing).

A. No, I never saw them—I never heard of them before.

Q. You just simply paid those bills as they came in out of this $30,000, without any investigation as to whether they were put on the vessel or not?

A. No, we did not. They were all O K-ed by their representative—every bill. We never paid a bill unless it was thoroughly approved by the proper officers.

Q. Who were the officers that approved these Sunde & Erland bills?

A. W. B. Hastings.

Q. Who is W. B. Hastings?

A. He was the assistant traffic manager of the North Alaska Steamship Company in Seattle.

(Testimony of Frank Waterhouse.)

Q. When you found these bills were coming in without your sanction and consent, did you make any objection?

A. Most of them came in after it was too late to make any objection.

Q. After when—after July 12th?

A. After the vessel sailed, on June 1st.

Q. Did any come in after July 12th?

A. I do not remember.

Q. If they did they will so show in this statement (showing)—the dates in that statement, so far as you know, are correct, Mr. Waterhouse?

A. Those are the dates of payment. I do not know when the bills came in.

Q. You do not know when they came in?

A. No.

Q. You do not know whether this Mr. Hastings represented the North Alaska Steamship Company after July 12th, 1904? A. I do not remember.

Q. You do not know whether that O. K. was put on the bill before or after that time?

A. (Examining bill.) Yes; it was paid here on July 13th; it was marked with the stamp paid July 13th.

Q. Well, here is one July 23d, now how about that one?

(Testimony of Frank Waterhouse.)

A. Well, these O K's were put on before the bills were paid, of course.

Q. You do not know whether they were put on after July 12th or not?

A. I do not know. The chances are they were put on before we received those bills in our office at all. Everything—

Q. (Interrupting.) That is only a conjecture on your part.

A. Well, I can soon find out whether they were or not.

Q. I have here a bill of June 14 of J. R. Mason to Frank Waterhouse & Company, steamer "Garonne," Western Policy No. 2672, $75,000; Western Policy 2672 (the same number) $37,500. Was that insurance for the "Garonne"? A. Yes, sir.

Q. Was that in addition to the insurance which was negotiated through your office?

A. To the best of my recollection this insurance was taken out when the other expired; the other was the Harbor Risk, and this was the Sea Risk.

Q. Well, here is another bill of July 23d, 1904, dating from June 1st, to premium on maritime policy 2,000 pounds, 9,500 pounds and 1,000 pounds, total 12,500 pounds—does that mean pounds sterling?

A. Yes, sir.

Q. That also was insurance on the "Garonne"?

(Testimony of Frank Waterhouse.)

A. Yes, sir. All that insurance was taken out on the "Garonne" under the instructions and at the instance of the North Alaska Steamship Company.

Q. It was partly to protect you for your interest in the ship, wasn't it?

A. It was partly to protect them against the debt that they owed us.

Q. You had an interest in the insurance to the extent of what was due on the ship?

A. Certainly.

Q. I hand you a bill of M. Seller & Company, dated June 25th on exhibit No. 9, for $387.50 for glassware and articles of that kind, and I will ask you whether you know whether that went on the steamer "Garonne"? A. I presume it did.

Q. But you do not know? A. No.

Q. Whose O K has that Seller bill got on it?

A. It does not seem to have anybody's.

Q. There is a bill of July 26th, 1904, from E. E. Caine, for commission on sale of tickets, $17,845, 5% $892.25; do you know anything about that (showing)?

A. Those were the tickets—that represented commission of 5% on tickets sold by E. E. Caine, under agreement with Mr. Ferguson, the general traffic manager of the North Alaska Steamship Company.

(Testimony of Frank Waterhouse.)

Q. You do not know what disposition Caine made of the $17,845. A. Yes.

Q. What did he do with it?

A. He remitted it to us—accounted for it to Frank Waterhouse & Company.

Q. And you credited it to the North Alaska Steamship Company? A. Yes, sir.

Q. Why didn't he take his commission out before he remitted it?

A. I do not remember, sometimes it is done that way.

Q. Is it not customary—

A. No. I forget what the reason was. Sometimes it is and sometimes it is not.

Q. I have got here a bill of O. A. Johansen, master of the ship, dated August 1st, and he claims from July 1st to the 9th inclusive, nine days, at $250 a month, $75; July 10th to the 15th inclusive, seven days, at $125 a month, $29.17; sixteen days' board at $1.50, $24, making a total of $128.17. Do you know anything about that?

A. Yes, I know all about it.

Q. Was he the master of the ship?

A. Yes; he was the master of the ship and he was paid up according to his contract with the North Alaska Steamship Company made by Mr. Ferguson;

(Testimony of Frank Waterhouse.)

and that payment was made by myself, on my order, on the strength of his contract with that company.

Q. But he did not work for the North Alaska Steamship Company after the 12th of July, did he?

A. Yes, I understood he was by the boat up to the time he was paid off.

Q. But the boat did not belong to the North Alaska Steamship Company after the 12th of July.

A. He was hired by the North Alaska Steamship Company, and remained in the employ of the North Alaska Steamship Company.

Q. Then the North Alaska Steamship Company provided Mr. Johansen to stand by the boat at the time the boat did not belong to them.

A. Let me see the dates (examining document). This receipt is "Received from the Merchants' & Miners' Steamship Company $128 in settlement of services as master of the steamer 'Garonne.' "

Q. It is part of the $30,000 which you claim that the North Alaska Steamship Company was owing to you. A. It owed us $32,000.

Q. No, it didn't—it shows a balance of $1,437.51, a credit balance. Now, do I understand you that any of this thirty or $32,000 which, when you were in New York, you were claiming was owing to you by the North Alaska Steamship Company—that any of

(Testimony of Frank Waterhouse.)

that is for bills or services or anything else rendered to the steamer "Garonne" after she became the property of the Merchants' & Miners' Steamship Company? A. No, sir.

Q. Then how do you explain Johansen's bill?

A. Because there are other items paid, which would go to make up more than $30,000, and more than $34,000, which are not included in that statement at all.

Mr. BOGLE.—It is only four days over the twelve days in that bill.

Q. (Mr. KING.) There is the bill of Lewis, Foard, Anderson & Company, dated May 25th, and it was paid on August 5th, "Steamer 'Garonne' and owners, $161.50"; do you know anything about that, Mr. Waterhouse?

A. I know that the bill is rendered for blocking furnished the "Garonne" which is receipted for by the chief officer.

Q. I hand you the Pacific Coast Coal bills appearing in exhibit No. 9, under date of August 4th, making a total of $4,271.45; do you know anything about that? A. No.

Q. Or did you know anything about it before it was paid? A. I knew it before it was paid.

Q. Was it sanctioned by you?

(Testimony of Frank Waterhouse.)

A. The payment of it?

Q. No, sir, the incurring of it—did you know that that amount of coal went on the "Garonne"?

A. I don't know.

Q. That bill is not O K-ed by anybody?

A. Well, the bunker receipts will be; that bill would not be O K-ed probably.

Q. There is no bunker receipt here—now, I hand you a number of bills and statements of the Seattle Hardware Company against the steamer "Garonne," aggregating $1,788.83, and I will ask you whether you know anything of them.

A. I know that it was for goods and materials furnished the steamer "Garonne," and the bills are all approved by the chief engineer of the steamer and the master of the steamer.

Q. Who was the chief engineer of the steamer?

A. P. L. Plaskett.

Q. Who is John Gorgensen?

A. John Gorgensen is our port captain at the present time.

Q. What relation does he bear to the "Garonne," if any?

A. He was employed by the North Alaska Steamship Company to superintend the work that was being done on her at that time, loading cargo and looking after her, acting as marine superintendent.

(Testimony of Frank Waterhouse.)

Q. I find here a bill of the Seattle Hardware Company of the 7th of May, 1904, a total of $238.13, and I will ask you who that is O K-ed by.

A. Well, I don't know; in all probability it appears in some other statement. That page is O K-ed by nobody. That is not all unusual, because it probably appeared in some other statement where it is O K-ed.

Q. Well, I only asked you about this, because you claim to have so little knowledge of those bills—and to find out whether you paid bills which you knew nothing at all about.

A. Mr. King, I have a large establishment up there, and I do not look after the details of all this work. I do not pay those bills personally or look after those things.

Q. That may be, but you have had every opportunity here to bring anybody about your establishment who does.

A. I have done everything you asked me.

Mr. KING.—And we have done everything we could to get the information.

The WITNESS.—I beg your pardon.

Mr. BOGLE.—I want the record to show that there was no call for anybody except Mr. Water-

(Testimony of Frank Waterhouse.)

house personally. I suggested to Mr. King to bring the bookkeeper and cashier down here, and we will offer now that he can have here anybody in the establishment that he desires.

Mr. KING.—I accept the offer. At the last hearing Mr. Bogle told me that he would have the cashier down here; that he knew more about the bills than Mr. Waterhouse.

Mr. BOGLE.—And you told me that you wanted to ask Mr. Waterhouse some questions, and that is the reason that I brought him.

Mr. KING.—That need not have prevented you from bringing the cashier.

Mr. BOGLE.—What is the use of his sitting here while you are examining Mr. Waterhouse? All I want is to have this record appear that we have offered and you can have the cashier or bookkeeper or anybody you want here with reasonable notice so that he can arrange his business.

Q. (Mr. KING.) You do not know anything about that any more than you did of the others (showing)? A. No, sir.

Q. I mean by that that you do not know anything more about the bills of this Standard Furniture Company.

(Testimony of Frank Waterhouse.)

A. No, sir, except that it is O K-ed by the steward before it was paid.

Q. Nor the bill of Schwabacher Bros. Company (showing)?

A. Those are bills for supplies furnished the steamer "Garonne" and paid by us after they were properly O K-ed by the superintendent and steward.

Q. What is the nature of those supplies?

A. Food supplies.

Q. Here is a bill of O. A. Johansen from July 17, to August 2d, sixteen days at $125 per month, $66.67; sixteen days' board, $1.50 per day, $24, making $90.67, which you have included in your statement as per Complainant's Exhibit No. 9. At the time that that bill was incurred the "Garonne" was not the property of the North Alaska Steamship Company, was she? A. What dates again?

Q. July 17th to August 2d, 1904.

A. July 17th to August 2d?

Q. Yes. During those dates the "Garonne" was not the property of the North Alaska Steamship Company.

A. No, sir. That bill has evidently got in there by mistake. It does not show it was paid by the North Alaska Steamship Company, but by the Merchants' & Miners' Steamship Company.

(Testimony of Frank Waterhouse.)

Mr. KING.—We move to strike that out as not responsive to the question.

Mr. BOGLE.—He has the right to make an explanation if he wants to.

Q. (Mr. KING.) The last claim that I have here is P. B. McLeod for $300; can you explain anything as to that (showing)?

A. Yes. This amount of $300 was paid to P. B. McLeod in settlement of his account against the North Alaska Steamship Company of $786.34 for services performed as agent for the North Alaska Steamship Company at Nome, for lightering services for them and for certain advance charges made by Mr. McLeod on account of the North Alaska Steamship Company, which the officers of that company failed to pay him for.

Q. Had you any dispute with McLeod about that matter?

A. We tried to get out of paying it, and we finally settled it, on the advice of our counsel.

Q. Did you settle it with the knowledge and consent of the North Alaska Steamship Company, or any of its officers or agents?

A. We settled it with the knowledge of the agents and the officers of the North Alaska Steamship Com-

(Testimony of Frank Waterhouse.)

pany. Captain Ferguson was talked to about it, and Mr. Hastings, also.

Q. What officer was Captain Ferguson?

A. He was the manager here, and Mr. Hastings was the assistant manager, and his title was "General Traffic Manager."

Q. How long was Captain Ferguson manager?

A. He was manager from the date the North Alaska Steamship Company bought the steamer until the steamer was turned back to Frank Waterhouse & Company?

Q. And then he ceased to be manager?

A. Yes, sir.

Q. Yet this bill was paid on January 31st, 1905.

A. Yes, sir.

Q. That was long after the steamer was turned back? A. Certainly.

Q. Was he manager then?

A. No, sir. We got all the information from him regarding it.

Q. Then there was really no officer of the North Alaska Steamship Company here in Seattle when that bill was paid.

A. I don't know whether there was or not. There was no officers of the North Alaska Steamship Com-

(Testimony of Frank Waterhouse.)

pany at that time, I think, both Mr. Hastings and Captain Ferguson were here at the time it was paid.

Q. But they were not officers of the steamship company at that time?

A. The North Alaska Steamship Company was not in existence, as far as I know at that time.

Q. What knowledge of this bill had you when you were in New York, on or about July 9th to the 12th, 1904? A. I did not have any.

Q. Then why was it included in the $32,000 which you claim was due you?

A, As I told you, there are a lot of other bills in addition to this included there that were included—or by which this $30,000 was made up.

Q. Wasn't that just a lump sum, and a guess?

A. No, it was not. We telegraphed to our treasurer here when we were in New York at this time, about the 6th or 7th, or early in July, 1904, and asked him what the amounts of the bills were that he had received up to that time against the steamer "Garonne," incurred by the North Alaska Steamship Company. I have a copy of his telegram in which he states either $30,000 or $32,000—thirty-two thousand and some odd dollars.

Q. Have you got that telegram here?

A. I have got it up home, and I can bring it down to you.

(Testimony of Frank Waterhouse.)

Q. And to make up that $30,000 you put in all those other bills? A. To make up what?

Q. To make up the—to make good his telegram.

A. It is a lien against the ship and what were we going to do with it.

Q. It is not demonstrated that it is any lien.

A. We were advised by counsel that it was a lien against the ship, and we paid it on those grounds.

Q. If it was a lien on the ship, then it was a lien against the ship when it was the property of the Merchants' & Miners' Steamship Company.

A. No; it was a lien against the ship when she was the property of the North Alaska Steamship Company.

Q. But you took the steamer back in settlement of all the debts, and you so testified, and you got $37,000; you had a settlement of all that, you testified about that.

A. We didn't have a settlement at all—I don't know what you mean.

Q. You testified so—you took it all back for $37,000.

Mr. BOGLE.—His testimony was that he took the ship back and undertook to pay the bills which were liens against it, which, of course, he had to pay, and

(Testimony of Frank Waterhouse.)

he raised money from Mr. King to pay it, and not from the North Alaska Steamship Company.

Q. (Mr. KING.) You say you do not know whether any of the money which you received, or that Frank Waterhouse & Company received, from freight or passenger money, was applied on the payment of the purchase price of the vessel.

A. I said I thought some of it was.

Q. Now, can you tell me what money you got from New York that was not freight or passenger money, on account of the purchase price of the vessel?

A. I do not remember, no.

Q. Have you any means of ascertaining?

A. Certainly I have.

Q. Will you ascertain?

A. I will be very glad to. I can give you all the information on the matter you want.

Q. You did receive something like $35,000 from the Occidental Securities Company, didn't you?

A. I do not remember. I think we did, however; I think we received that amount from them, or something like that.

Q. You also received, in the neighborhood of $15,000 in cash from New York, didn't you?

Mr. BOGLE.—Do you mean in addition to the $35,000?

(Testimony of Frank Waterhouse.)

Mr. KING.—Yes, in addition to the $35,000.

A. I do not remember.

Q. Prior to the $35,000? A. No, sir.

Q. Eh? A. No, sir.

Q. You did not?

A. No, sir, I think the first payment we received in New York was the $1,000, and the next, I think, if I recollect, was $24,000.

Q. It was not $14,000?

A. I do not remember, I will be very happy to furnish you a statement showing exactly what we received, when we received it, and from what sources.

Q. Now, when could you furnish that statement —now, I am asking you that for the reason that Mr. Bogle tells me that you are going away and we desire to close this case.

Mr. BOGLE.—If you will make out a list of just what you want from the books we will furnish them at any time you want it.

Mr. KING.—It is hard for me to tell what I want. I am in a position here of examining the dèfendant himself who is, of course, an adverse witness as far as I am concerned, and I cannot have any consultation with him beforehand, as I could with an ordinary witness, and it is very hard for me to tell just what I want.

(Testimony of Frank Waterhouse.)

The WITNESS.—As far as I am concerned, you can come and consult with me and I will show you every voucher up there in the office—everything you want.

Mr. KING.—I have asked for that. I want to find out how much money was received from the North Alaska Steamship Company from any source, and what disposition was made of it.

Mr. BOGLE.—If that is what you want I will have Mr. Townsend make up a full statement showing every item. Now, if there is anything else you want, if you can foresee anything else, we would be very glad to furnish it, and we will have Mr. Townsend here for you to examine, if you want any details as to any of the items.

Mr. KING.—I desire to be sworn.

GEORGE H. KING, appearing as a witness in behalf of complainant, being first duly cautioned and sworn, testifies as follows:

Mr. KING.—I simply want to testify that I am the attorney for the complainant in this suit; that I have lived in Seattle some sixteen years. During that time I know the "Post-Intelligencer" to be a daily newspaper published daily in the city, and that I personally took the extract, or copy, which I offer

in evidence, and ask that it be marked as "Complainant's Exhibit No. 10," from the Seattle "Post-Intelligencer," running from May 25th to June 2d, 1904.

(Document identified by the witness received in evidence and marked "Complainant's Exhibit No. 10.")

(Testimony of witness closed.)

10 January, 1906, 10:00 A. M.

Continuation of proceedings, pursuant to adjournment; all parties being present as heretofore.

Mr. KING.—I offer in evidence Plaintiff's Exhibit "11," which is admitted by the defendants to be a correct copy of the telegram received by Mr. Waterhouse in New York, concerning the indebtedness against the steamship "Garonne," as mentioned in his testimony.

(The document is here received in evidence and marked "Plaintiff's Exhibit 11.")

I offer in evidence Plaintiff's Exhibit No. "12" also numbers "13," "14," "15," and "16," which are sundry vouchers furnished me by the defendants, and are parts of the items mentioned in Plaintiff's Exhibit "9." It is stipulated between counsel that counsel for the defendants can withdraw any

of these exhibits on furnishing a copy to the Court of the Master; is that all right, Mr. Bogle?

Mr. BOGLE.—Yes, that is satisfactory.

(The documents are here received in evidence and marked respectively as indicated in the offer.)

Mr. KING.—I offer in evidence Plaintiff's Exhibit "17," being a bill furnished me by Mr. Waterhouse of the services of O. A. Johnson as master of the steamship "Garonne."

(The document is here received in evidence and marked "Plaintiff's Exhibit 17.")

I offer in evidence Plaintiff's Exhibit "18," being sundry bills mentioned and described in Plaintiff's Exhibit "9." The same stipulation as to withdrawal relates to these as to the other things.

(The documents are here received in evidence and marked "Plaintiff's Exhibit 18.")

I offer in evidence Plaintiff's Exhibit No. "19," being a statement of the receipts and disbursements made by Frank Waterhouse & Co. on account of the steamer "Garonne," from 3 February, 1904, until the sale of the ship to the Merchants' and Miners' Steamship Company, being all receipts and disbursements not included in Plaintiff's Exhibit "9."

(The document is here received in evidence and marked "Plaintiff's Exhibit 19.")

JOHN JORDISON, a witness produced in behalf of the complainant, being first duly sworn, testified as follows:

Q. (By Mr. KING.) State your name.

A. John Jordison.

Q. Where do you reside? A. At Seattle.

Q. How long have you resided there?

A. Off and on about twenty years.

Q. What is your business?

A. Superintendent for Mr. Waterhouse, and pilot.

Q. Are you now in the employ of Frank Waterhouse & Co.? A. Yes, sir.

Q. Do you know the steamship "Garonne"?

A. Yes, sir.

Q. And did when she was in these waters?

A. Yes, sir.

Q. Were you employed by the Northern Alaska Steamship Company during the spring and summer of 1904? A. Yes, sir.

Q. In connection with the steamer "Garonne"?

Q. I call your attention, Captain, to an item of disbursements in Plaintiff's Exhibit "19" and of date 7 March, 1904, "Labor and Material, February, $982.13"; can you tell me what that is for?

(Testimony of John Jordison.)

A. March 7th; well, no; not from here, not unless I see the bills.

Q. Have you no general idea, captain, as to what it was for?

A. Well, there was labor and material furnished on that ship; there was sheathing laid on her deck and a lot of rooms fixed up; a lot of labor employed on the ship, in the way of sailors, firemen, coal-passers, different people in the steward's department but whether that applies to this I can not tell.

Q. Is that your answer to the April 7th item, "Labor and Material, March, $1,096.90?"

A. Yes, sir.

Q. And also to the item of May 5th, "Labor and Material, April, $1,076.90?"

A. Yes; may be it is payrolls, for all I know.

Q. Who were employed in the ship at that time, to the best of your recollection?

A. Oh, I could not say.

Q. I mean how big a crew; I don't mean all their names.

A. I think we had something like thirty men aboard at that time.

Q. What were they doing?

A. Cleaning; the stewards' crowd was cleaning the cabins, and the engineers' crowd was cleaning the boilers and the engine-room, the bilges, and all

(Testimony of John Jordison.)

that; and they had men on the deck, scraping and painting.

Q. You had that number of men during February, March, and April, 1904?

A. To the best of my knowledge, that is what it applies to.

Q. Take now the item of 31 May; "W. H. Morris, account painting, $622.10"; how about that?

A. Yes, sir; that was painting in the cabins.

Q. Right under it here; "Victoria Dry Docking account, $1,979.31"; do you know what that was?

A. Docking the ship and scraping and painting her, from the water-line down.

Q. Where?

A. In Esquimalt drydock.

Q. Was anything else done to her at that time, except scraping, painting, and cleaning her?

A. I think some bolts put in the rudders and strainers for the suction pipes.

Q. In fact, a general overhauling of the underwater body of the ship? A. Yes, sir.

Q. Now right below that—here—"Funds advanced Captain Jordison for payment laborers, $4,856.00." A. Yes, sir.

Q. Well, what do you know about that?

A. Well, I would not say as to what it is, unless I saw the vouchers for it.

(Testimony of John Jordison.)

Q. You can not say what it is from memory?

A. No, sir, I cannot; I could not—the items of it.

Q. Have you any ideas as to what time that expenditure was made; over what times—how long—these wages extend?

A. No, I could not say.

Q. I call your attention to this item of 9 June—here on the next page—"S. S. 'Garonne,' repairs and port expenses, C. M. Shaw & Co., on account, $800.00."

A. That was the plumber.

Q. That was for plumbing and repairs on the ship?

A. Plumbing and repairs on the ship; yes, sir.

Q. On 18 June; "S. S. 'Garonne,' repairs and port expenses, King and Winge on account, $1,000.00"; what was that?

A. King & Winge sheathed the deck and fixed up a lot of staterooms—and other repair work; boats, and one thing and another.

Q. Boats; do you mean life-boats?

A. Yes, sir; and fixed up a lot of new staterooms, tore out the bathrooms, and one thing and another.

(Testimony of John Jordison.)

Q. On the 21st: "S. S. 'Garonne,' repairs and port expenses, Northwestern Improvement Co., $425.49"; what do you know about that?

A. Could not swear about that unless I saw the vouchers.

Q. What do you think it was for, or do you know what it was for?

A. Payrolls, probably, or materials.

Q. What did the Northwestern Improvement Company do; that is what I want to get at.

A. Was not that the name of the concern at that time?

Mr. BOGLE.—What concern?

A. The Northwestern Improvement Company, was not it?

Mr. BOGLE.—I do not know.

Q. (By Mr. KING.) Then you do not know what that Northwestern Improvement Company item was for?

A. No, I could not very well say, unless I saw the vouchers.

Q. Now, this item of 15 July: "C. M. Shaw & Company, $1295.78"; what was that?

A. Well, he is a plumber and pipe-fitter.

Q. That was plumbing and pipe-fitting done on the ship? A. Yes, sir.

(Testimony of John Jordison.)

Q. When did you take charge of the ship for the Northern Alaska Steamship Company?

A. I could not remember the date now.

Q. Well, what month?

A. I think it was in May; somewhere about then.

Q. Was not it in February?

A. Well, I could not call it to mind now; I have been with her so many years, I could not tell just what month it was, because I did not pay any particular attention to who the company was she was operated under; I was working for Mr. Waterhouse.

Q. You were not working, then, for the Northern Alaska Steamship Company?

A. Working just the same as I was right along.

Q. Were you on the ship in February, 1904?

A. Yes, on her off and on.

Q. Can you tell me what was done to the ship between February, 1904, and the time she sailed for Alaska on her first trip?

A. Oh, general overhauling, repairs, cleaning.

Q. Tell us about the repairs.

A. There were new staterooms put in her; the deck was sheathed; and cleaning and painting was done on her.

Q. Were there any repairs to the engines or machinery?

(Testimony of John Jordison.)

A. Yes, sir.

Q. What was the nature of them?

A. I could not describe that all; because Mr. Prescot had charge of that.

Q. About how long were they working on them?

A. He had men there two or three months, cleaning.

Q. There were pretty thorough repairs made?

A. Yes, she was put in shape to go to sea.

Q. When she left here on June 22d?

A. Yes, sir.

Q. Do you know what the aggregate cost of those repairs was? A. I could not call it to mind now.

Q. Would you say it amounted to $15,000.00 to do that work?

A. I think they would cost more than that; payrolls, and bills, and one thing and another.

Mr. KING.—That is all.

Mr. BOGLE.—That is all.

(Testimony of witness closed.)

(Whereupon it is stipulated between counsel, in open court, that the signature of the witness to the foregoing deposition may be waived, and that said deposition shall be of the same force and effect as if signed by said witness.)

Mr. KING.—We offer in evidence Plaintiff's Exhibit "20," which was furnished by the defendants and is admitted to be a correct statement of the amount of insurance on the steamer "Garonne," from 1 July, 1904, to 8 April, 1905.

(The document is here received in evidence and marked "Plaintiff's Exhibit 20.")

We offer in evidence Plaintiff's Exhibit No. "21," furnished me by the defendants, and admitted to be a correct copy of an agreement entered into on 9 July, 1904, between W. F. King of New York City and Frank Waterhouse of Seattle.

(The document is here received in evidence and marked "Plaintiff's Exhibit 21.")

It is admitted on both sides that the Merchants' and Miners' Steamship Company was incorporated in the State of New York on 12 July, 1904, with a capital stock of $100,000.00.

Mr. BOGLE.—Yes.

Mr. KING.—I offer in evidence Plaintiff's Exhibit "22," being a certified copy of the bill of sale of the steamer "Garonne," from Frank Waterhouse and Company, incorporated, to the Merchants' and Miners' Steamship Company of New York, and the certificate of the customs-house at New York as to the certified copy.

(The document is received in evidence and marked "Plaintiff's Exhibit 22.")

I offer in evidence Plaintiff's Exhibit "23," being a certified copy of the bill of sale of the steamship "Garonne" from the Merchants' and Miners' Steamship Company of New York to the White Star Steamship Company of Seattle; together with the certificate on the back.

(The document is here received in evidence and marked "Plaintiff's Exhibit 23.")

Plaintiff rests.

Tuesday, April 17th, 1906, 2 P. M.

Continuation of proceedings pursuant to agreement.

FRANK WATERHOUSE, defendant, produced as a witness in behalf of defendants, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. BOGLE.) Mr. Waterhouse, you are the defendant in this case, are you?

A. Yes, sir.

Q. You are the president of Frank Waterhouse & Company, Incorporated, are you?

A. Yes, sir.

Q. And the principal stockholder in that company? A. Yes, sir.

Q. In January and February, 1904, who was the owner of the steamship "Garonne"?

(Testimony of Frank Waterhouse.)

A. Frank Waterhouse & Company.

Q. How long had your company owned that steamer? A. Six years.

Q. Was the "Garonne" an American steamer?

A. No; a British vessel.

Q. When was she built? A. About 1870.

Q. She had an iron hull? A. Yes, sir.

Q. What was her dead-weight carrying capacity at that time? A. Cargo?

Q. Cargo, yes.

A. Well, in the trade in which she was engaged, about from 1000 to 1200 tons.

Q. Did you negotiate a sale, or contract for a sale of that vessel in January or February, 1904, if so to whom?

A. Yes, sir; I negotiated a sale to the North Alaska Steamship Company.

Q. Who was acting for the North Alaska Steamship Company in these negotiations?

A. Captain Ferguson.

Q. W. H. Ferguson? A. W. H. Ferguson.

Q. At that time did you know for whom Captain Ferguson was acting?

A. When the negotiations commenced, no, I did not know anything about it.

Q. Captain Ferguson lived in Seattle at that time, did he? A. Yes, sir, as far as I know.

(Testimony of Frank Waterhouse.)

Q. I hand you a copy of a telegram dated February 3, 1904, purporting to have been sent by you to W. H. Ferguson, Fifth Avenue Hotel, New York, and a copy of a letter purporting to have been written by you to Captain Ferguson on January 26th, 1904, and I will ask you to look at those papers and state whether they are copies of the letter and the telegram embodying the terms of the contract which you made with Captain Ferguson at that time.

A. Yes, sir.

Mr. BOGLE.—I offer these in evidence as Exhibits "A" and "B."

Mr. KING.—We object to the introduction of the documents in evidence as irrelevant, immaterial and incompetent, and for the reason that they have not been connected in any way with General Dodge, or any interest of General Dodge's.

Mr. BOGLE.—I will ask you whether you object to their being copies instead of the originals?

Mr. KING.—No. I have got the original telegram here, and if you say that you have got that sort of a letter, that is sufficient, I do not want any technical objections.

I also object to them on the ground that these matters were all included in the accounting between Mr.

(Testimony of Frank Waterhouse.)

Waterhouse, or Frank Waterhouse & Company and Mr. Pusey, representing General Dodge at or about June 2d, 1905.

(Documents received in evidence and marked respectively "Defendants' Exhibits 'A' and 'B.' ")

Q. (Mr. BOGLE.) How much cash was paid to you at the time by Captain Ferguson on this purchase?

A. I think it was $1,000; my recollection is very indistinct about it.

Q. Did Captain Ferguson, or the party for whom he was acting, at any time furnish you with a corporation bond guaranteeing the vessel against any indebtedness incurred during the time the vessel was in their hands? A. No, sir.

Q. Did he, or the parties for whom he was acting, ever execute notes (and secured by a mortgage upon the vessel, and assignment of the marine insurance thereon, and such other security as would be satisfactory to you, to secure the deferred payments?

A. No, sir.

Q. Who is the auditor and cashier of Frank Waterhouse & Company?

A. James B. Townsend.

Q. When payments were made to that company by the North Alaska Steamship Company, or any-

(Testimony of Frank Waterhouse.)

one on its behalf, through whose hands did those payments pass? A. James B. Townsend's.

Q. Can you, of your own personal knowledge, state what payments were made upon the purchase of this steamer?

A. No, sir; I cannot without referring to the books of the company.

Q. The books of the company show correctly all the payments and all the cash received from that company for any purpose whatever, so far as you know, do they? A. Yes, sir.

Q. I will ask you to state what efforts, if any, were made by you to induce the North Alaska Steamship Company or Capain Ferguson to carry out the terms of the contract of sale as shown and embodied in your telegram of February 3, marked exhibit "A" in your deposition?

Mr. KING.—I make the same objection to that as I have heretofore interposed.

A. Every possible effort was made by me to get them to carry out their bargain, both by letter and by wire and by personal interview with them. Time and time again I extended the dates of payment at their urgent request, and extended every consideration I could to them in order to enable them to complete their purchase.

(Testimony of Frank Waterhouse.)

Q. Did the North Alaska Steamship Company, through its representatives, at any time obtain possession of the steamer "Garonne" during the spring and summer of 1904, and, if so, for what purpose and under what conditions?

Mr. KING.—I object to that as irrelevant, immaterial, incompetent, and calling for a conclusion from the witness.

A. I do not quite understand that question, Mr. Bogle.

(Question repeated to the witness.)

A. The title to the steamer was never transferred to them. They were permitted, however, to put their own crew in the steamer and to make one round voyage from Seattle to Cape Nome, in June, 1904, on their own account, and the vessel was also in their charge for the purpose of making little changes that they desired to make on her; repairs and betterments; from about the middle of March until she sailed about the 2d of June.

Q. I hand you a package of papers, eighty-six in number, purporting to be correspondence by mail and telegram between yourself and the officers of the North Alaska Steamship Company, and I will ask you if those are telegrams and letters that passed between you and that company during the period as

(Testimony of Frank Waterhouse.)

shown by the dates of this correspondence? (Showing documents to witness.)

A. This correspondence consists of copies of letters and copies of telegrams that passed between the officers of the Occidental Securities Company, the North Alaska Steamship Company, the Chase National Bank of New York; all having reference to the sale of the "Garonne" by me to the North Alaska Steamship Company.

Mr. BOGLE.—I now offer these letters and telegrams in evidence.

Mr. KING.—We object to these as irrelevant, immaterial and incompetent, and there is no showing made that General Dodge ever had any knowledge or notice of them. I do not object to them as being copies.

(The bundle of correspondence identified by the witness is here received in evidence and marked "Defendants' Exhibits 'C' to '1-13,'" inclusive.)

Q. (Mr. BOGLE.) Mr. Waterhouse, are you acquainted with the plaintiff, Grenville M. Dodge?

A. No, sir.

Q. Did you ever meet him? A. No, sir.

Q. When was the first time that you ever heard of Mr. Dodge?

(Testimony of Frank Waterhouse.)

A. I think either the very last of April or the first of May, 1904.

Q. I call your attention to a telegram to you from C. B. Smith, dated at New York May 13, 1904, reading as follows: "To insure your protection, executed contract to-day, General Grenville M. Dodge. Nature contract itself protects you. Consult Dunn & Bradstreet for Dodge's rating. Mailing particulars. Have paid 5,000 more than terms of sale. Hoped to assist you and save discount, still expect to do so if necessary. Satisfactory securities for deferred payments. Some money to-morrow," and which is marked exhibit "T-I," and I will ask you if the receipt of that telegram was the first time that you ever heard of the complainant Grenville M. Dodge? A. Yes, sir.

Q. What, if any, action did you take upon the receipt of this telegram in view to ascertaining who General Dodge was and what was the nature of the contract that Mr. Smith had made with him for your protection?

A. I telegraphed my bankers in New York, the Chase National Bank, asking who General Dodge was, and what his financial standing was.

Q. I call your attention to a telegram from you to the Chase National Bank, under date of May 23,

(Testimony of Frank Waterhouse.)

1904, being one of the exhibits filed in this case with your deposition and I will ask you whether that is the telegram to which you refer (showing)?

A. Yes, sir.

Q. I call your attention to a letter from the Chase National Bank, under date of May 24, 1904, being one of the exhibits filed with your deposition, and I will ask you whether that is the response that you received to that telegram (showing).

A. It is, yes, sir.

Q. I call your attention to a letter from the North Alaska Steamship Company, dated New York, May 17, 1904, being one of the exhibits filed with your deposition, and I will ask you if that letter was received by you in due course of mail soon after that date (showing)? A. It was.

Q. Did you at any time ever ascertain, further than is shown by the communications referred to, the nature of the contract that the North Alaska Steamship Company had made with General Dodge for your security?

A. I never could. I did not know what it was and I never could find out, although I repeatedly tried to.

Q. Did General Dodge, or the North Alaska Steamship Company, ever turn over to you any con-

(Testimony of Frank Waterhouse.)

tract or obligation of General Dodge, securing the deferred payments to you? A. No, sir.

Q. I call your attention to a copy of a telegram purporting to have been sent by you to Charles B. Smith, the Occidental Securities Company, 42 Broadway, New York City, on May 25, 1904, being one of the exhibits filed with your deposition. And I will ask you if that is a correct copy of the telegram (showing). A. That is a correct copy.

Q. Explain what was the occasion for sending that telegram.

Mr. KING.—I make the same objection to all this, that is, on account of the lack of knowledge of General Dodge, and not being brought home to him.

A. Our inability, after exerting every effort, to get the North Alaska Steamship Company to pay for this steamer according to their agreement, to satisfactorily secure the deferred payments; the date the telegram was sent was nearing the date at which the steamer should sail for Alaska, and I was unwilling to allow the steamer to proceed to sea in charge of the officers of the North Alaska Steamship Company until they had carried out their contract of purchase, at least enough to partly secure us for the amount then due.

(Testimony of Frank Waterhouse.)

Q. I call your attention to a telegram from J. B. Leake from New York, under date May 25, 1904, addressed to you, and I will ask you whether that is the telegram received by you in reply to the one just referred to (showing). A. Yes, sir.

Q. Who was J. B. Leake?

A. He was the secretary of the Occidental Securities Company and of the North Alaska Steamship Company, residing in New York.

Q. I call your attention to a telegram from you to the Occidental Securities Company, No. 42 Broadway, New York, under date May 26, 1904, and I will ask you whether that is a correct copy of a telegram sent by you on that date (showing).

A. Yes, sir, it is.

Q. Who were the Occidental Securities Company?

A. They were the owners of the North Alaska Steamship Company.

Q. I call your attention to a telegram from New York under date of May 26th to you from J. B. Leake, and I will ask you whether that is the answer which you received to that wire (showing).

A. Yes, sir.

Q. I call your attention to a telegram from Charles B. Smith dated New York, May 25th, ad-

(Testimony of Frank Waterhouse.)

dressed to W. H. Bogle, Seattle, which reads as follows: "Wired Waterhouse in full regarding telegrams of day" and which is marked exhibit "J-I"; will you please explain to what that refers?

Mr. KING.—I desire to interpose the same objection.

A. That telegram was sent for the reason that I had instructed Mr. Bogle, our attorney, to wire those people—to wire Mr. Charles B. Smith, the president of the Occidental Securities Company and North Alaska Steamship Company, that unless the terms of sale were satisfactorily completed immediately to take steps—or that steps would be taken to cancel the contract of purchase, and this telegram in question was sent to Mr. Bogle in answer to the one he sent notifying them to that effect.

Q. (Mr. BOGLE.) When was the first time that you ever met Charles B. Smith?

A. Either the 30th or the 31st day of May, 1904.

Q. Where did you meet him?

A. In my office in the Burke Building, Seattle.

Q. Was that just prior to the sailing of the "Garonne" for Nome?

A. Two days before she sailed.

Q. I call your attention to a copy of a telegram purporting to have been sent by Charles B. Smith

(Testimony of Frank Waterhouse.)

from Seattle on May 31st, 1904 to the Occidental Securities Company, New York, being one of the exhibits filed with your deposition, and I will ask you whether that was sent by Mr. Smith from your office (showing)? A. Yes, sir.

Q. What was the situation on that date; how much did the North Alaska Steamship Company owe to you on the purchase price of the vessel, and approximately how much did they owe on supplies and material and labor that were liens on the "Garonne"? A. On that date?

Q. Yes—May 31st, 1904.

A. I think they owed about $50,000 on the purchase price, and between $30,000 and $35,000 on the payment for supplies, repairs and betterments.

Q. You are giving those figures from memory, are you? A. Entirely.

Mr. KING.—Then I move to strike it out as not the best evidence.

Q. (Mr. BOGLE.) Did you ever meet Mr. Pusey, a representative of the complainant G. M. Dodge in connection with these matters?

A. Yes, sir, I met him in my office in Seattle on the 30th and 31st day of May, 1904, for the first time.

Q. How long was that before the "Garonne" sailed on her voyage to Nome?

(Testimony of Frank Waterhouse.)

A. Two or three days.

Q. Was Charles B. Smith, the president of the North Alaska Steamship Company, present?

A. Part of the time, yes, sir.

Q. State what transpired between Mr. Pusey and yourself.

A. Mr. Pusey called on me and stated that he was the son-in-law of General Dodge of New York, and that he had come to Seattle for the purpose of securing, if possible, the repayment of a loan of $10,000 that General Dodge had made to Charles B. Smith. He said that Charles B. Smith had promised General Dodge that this loan should be repaid out of the first freight earned by the steamer "Garonne," and wanted to know if we would see that the payment was made in accordance with this alleged agreement.

I told Mr. Pusey that, inasmuch as there was a large amount of money still owing to us on the purchase price of the vessel and an almost equally large amount of money owing by the North Alaska Steamship Company for repairs and betterments that they had placed on the "Garonne," and for supplies they had purchased for her which would constitute a lien against that steamer if not paid, that I should insist on all the money the steamer earned being

(Testimony of Frank Waterhouse.)

paid to us to apply first on the bills which had been contracted by the North Alaska Steamship Company on account of the steamer, and afterwards on account of the purchase price, and that I would not recognize any agreement made between General Dodge and Charles B. Smith. Mr. Pusey then dropped, or discontinued his attempt to pursuade me to recognize the above mentioned agreement, and asked my cooperation in helping him to obtain the payment of or satisfactory security for the loan of General Dodge to Mr. Smith. Mr. Smith, who was in Seattle at the time, was called in and consulted regarding it, and he informed me that the loan in question was a private matter between himself and General Dodge; that it was not an obligation of either the Occidental Securities Company or the North Alaska Steamship Company. He expressed a desire, however, to repay the money to General Dodge as quickly as he could, and in the meantime to furnish security for it, if possible. Mr. Smith then agreed with Mr. Pusey that the "collect" freight money which would be due the North Alaska Steamship Company upon the correct delivery at Cape Nome of the "Garonne's" cargo destined for that port, should be paid over, or should be held for the account of General Dodge, and not used for any other purpose. He agreed to instruct his agent

(Testimony of Frank Waterhouse.)

at Cape Nome to collect this money, which, if my memory serves me, amounted to some six or seven thousand dollars, and to remit it to the Seattle National Bank for account of General Dodge, and to be applied on the payment of the above-mentioned loan; and I agreed as soon as the money was received by the Seattle National Bank to cause it to be forwarded to New York to General Dodge, or to notify him of its receipt in Seattle—I forget just which. Furthermore Mr. Smith agreed, on behalf of the North Alaska Steamship Company, to execute a mortgage to Frank Waterhouse & Company on the "Garonne" to secure it against the balance of the purchase price, and to promptly cause to be remitted from New York sufficient sums to pay the bills that had been contracted by and were then owing by the North Alaska Steamship Company on "Garonne's" account. He also agreed to execute a second mortgage on the steamer in favor of general Dodge, to further secure the repayment of the $10,000 debt owing by Charles B. Smith to General Dodge.

I cannot remember now whether there were two mortgages and whether there were two mortgages executed by Mr. Smith, or whether there was only one mortgage with an agreement between Mr. Pusey and myself that the Frank Waterhouse Company

(Testimony of Frank Waterhouse.)

claims in the mortgage were prior claims to those of General Dodge and were to be first paid, but it was one or the other. Now, the mortgage was drawn; it was signed—the mortgage or mortgages—it, or they, were signed by Charles B. Smith as president of the North Alaska Steamship Company, and handed to me to be forwarded to New York for the signature of the secretary of that company, with the assurance on Mr. Smith's part that the execution would be completed without any delay as soon as the document reached New York City. I sent the mortgage or mortgages, to the Chase National Bank in New York together with a bill of sale of the steamship "Garonne," and instructed the bank to notify Mr. J. B. Leake, the secretary of the North Alaska Steamship Company, who was a resident of New York, that the bill of sale and the mortgages were there; the latter for execution, and the former to be delivered to him as soon as the mortgages were properly executed. In due course of mail, or by wire, I do not now recollect which, the Chase National Bank advised me that Mr. Leake declined to execute the mortgage, on the ground that his directors refused to complete the arrangements made between Charles B. Smith, Frank Pusey and myself.

Q. (Mr. BOGLE.) I call your attention to the copy of a letter to the Chase National Bank New

(Testimony of Frank Waterhouse.)

York City, under date June 3d, 1904, being one of the exhibits heretofore filed with your deposition, and I will ask you whether that is a copy of the letter referred to, in which you inclosed this mortgage (showing). A. Yes, sir.

Q. I note by this letter that you state you enclose bill of sale of the steamship "Garonne" from Frank Waterhouse & Company, Incorporated, to the North Alaska Steamship Company, also a mortgage on the steamer from the North Alaska Steamship Company to Frank Waterhouse & Company. Did you enclose a bill of sale properly signed by Frank Waterhouse & Company, Incorporated, to be delivered upon the execution of the mortgage?

A. Yes.

Q. I call your attention to a copy of a letter written to J. B. Leake, 42 Broadway, New York City, under date June 3d, 1904 and I will ask you whether that is a correct copy of the letter sent by you to him on that date (showing). A. Yes, sir.

Q. I call your attention to a copy of a letter sent to the Occidental Securities Company, 42 Broadway, New York, under date June 3d, 1904, and I will ask you whether that is a copy of a letter written by you and mailed to them on that date (showing).

A. It is.

(Testimony of Frank Waterhouse.)

Q. What moneys, if any, were received by you subsequent to that date from New York for the payment of the bills that were liens against the "Garonne"? A. None.

Q. What remittances, if any, were ever received by you from Nome, Alaska, from the freight collected there under the arrangement between Smith and Pusey? A. None.

Q. There is, attached to the bill of complaint in this case, a contract between yourself and Mr. Pusey, by which it was agreed that you are to act as trustee for General Dodge in reference to these matters. Explain how that contract came to be executed.

A. Mr. Pusey wanted to have somebody here on the ground to help protect the interests of General Dodge in carrying out the agreement which I mentioned above, which was made between Charles B. Smith and himself, and he asked me, solely as a matter of accommodation, if I would act in the capacity of attending to General Dodge's interests in securing the completion of this agreement, if possible, and the proper carrying out of it. As a matter of accommodation purely, I agreed to act in that capacity, and had it stated in the memorandum of agreement that was drawn up between himself and my-

(Testimony of Frank Waterhouse.)

self that I did so act purely as a matter of accommodation to General Dodge and himself.

Q. Did Mr. Pusey have any acquaintances in Seattle at that time?

A. Not one that I know of.

Q. Did the North Alaska Steamship Company ever complete the execution of the mortgage that was forwarded to the Chase National Bank?

A. No, sir; they declined to.

Q. I call your attention to a telegram sent by you to J. B. Leake, 42 Broadway, New York, under date of June 10, 1904, reading as follows, and which is marked exhibit "U": "Have you executed mortgage and remitted money pay expense bills here? These matters pressing; require immediate attention. Answer." Did you send that telegram on that date? A. I did.

Q. I call your attention to a telegram from yourself to W. H. Rowe, 42 Broadway, New York, under date June 14, 1904, marked exhibit "N," and which reads as follows: "Will not let conditions remain as at present. Insist debts against 'Garonne' now due be paid immediately and mortgage be executed immediately. Will expect prompt reply stating definitely what you intend to do." Did you send that telegram? A. I did.

Q. Who was W. H. Rowe?

(Testimony of Frank Waterhouse.)

A. He was the vice-president of the Occidental Securities Company, and the vice-president of the North Alaska Steamship Company, and was at that time in New York.

Q. I call your attention to a telegram addressed to you and sent by J. B. Leake from New York under date June 11, 1904, being one of the exhibits filed with your deposition, and I will ask you whether you received that telegram on that date (showing). A. I did.

Q. I call your attention to a telegram addressed to you signed W. H. Rowe from New York, under date June 11th, being one of the exhibits attached to your deposition and I will ask you whether you received that on that date (showing).

A. I did.

Q. I call your attention to a telegram addressed to Frank Waterhouse & Company, signed W. H. Rowe from New York under date June 14, being one of the exhibits attached to your deposition, and I will ask you whether you received that telegram on that date? A. I did.

Q. Did the Mr. Mead referred to in that telegram, arrive in Seattle soon afterwards?

A. Yes, sir.

Q. Referring now to the time of the arrangement with Mr. Pusey state whether or not he was ad-

(Testimony of Frank Waterhouse.)

vised by Mr. Smith and yourself of the amount of the indebtedness due your company for the purchase price of the ship, and of the amount of the outstanding bills against the North Alaska Steamship Company so far as you knew of their existence at that time?

A. He was fully advised, yes, sir.

Q. What was done when Mr. Mead arrived in Seattle?

A. Mr. Mead inquired into and fully ascertained the condition of the North Alaska Steamship Company's indebtedness to Frank Waterhouse & Company, and to many and various creditors here on account of work done to, and supplies bought for the "Garonne," and conferred with Captain Hastings, who had been left here in charge of the North Alaska Steamship Company's office, and subsequently returned to New York, after spending about a week here in company with Mr. Bogle and myself.

Q. By whose request did you and Mr. Bogle go to New York? A. Mr. Mead's.

Q. For what purpose?

A. In an endeavor to reach some satisfactory adjustment of the amount due us on the purchase price of the "Garonne."

Q. About what time did you reach New York?

(Testimony of Frank Waterhouse.)

A. The very end of June, 1904, or the first of July.

Q. At that time where was the bill of sale and the mortgage which had been forwarded by you to the Chase National Bank?

A. At the Chase National Bank.

Q. After reaching New York, did you attend any meeting of the North Alaska Steamship Company and the parties who were interested in that company? A. Yes, sir, several of them.

Q. Did Mr. Mead submit any report to that company, or the directors of that company, of the conditions existing out here?

A. Yes, sir; he told them exactly what the conditions were; he made them a written report.

Q. What was done in the way of making a settlement or adjusting the matters at that time when you were in New York?

A. After repeated efforts on the part of Mr. Mead and his friends, Mr. Leake and Mr. Rowe and their friends—the latter of whom constitutes the Occidental Securities Company and the North Alaska Steamship Company—the latter threw up their hands and served a written notice on me that they would be unable to complete their contract of purchase on account of their inability to raise money, and that they would be unable to pay the large

(Testimony of Frank Waterhouse.)

amount of debt that they had incurred on "Garonne's" account in Seattle, for the same reason.

Q. Did you, or your attorney, after you had exhausted your efforts in negotiating for a settlement, serve any notice on the North Alaska Steamship Company, that unless they carried out the contract you would take steps to cancel and forfeit it?

A. Yes, sir.

Mr. KING.—We object to the form of the question. There is no evidence here that they made or exhausted any efforts.

Q. (Mr. BOGLE.) How many days were you in negotiation with those parties, in the effort to secure a settlement?

A. I think about ten days, or two weeks.

Q. Did they raise any money to pay off their indebtedness which had been incurred here for material and labor, that were liens on the ship?

A. No, sir, they could not do it.

Q. Did they raise any money to pay off any part of the indebtedness to you? A. No, sir.

Q. I now hand you a paper and will ask if that was furnished to you by the officers of the North Alaska Steamship Company during this time in New York, as a correct copy of the minutes of the

(Testimony of Frank Waterhouse.)

meeting of the Board of Directors on that date (showing)? A. Yes, sir.

Mr. BOGLE.—I now offer this in evidence as exhibit "J-3."

Mr. KING.—I object to that as irrelevant, immaterial, incompetent and not the best evidence.

(Document received in evidence and marked Defendants' Exhibit "J-3.")

Q. (Mr. BOGLE.) I now hand you another paper, and I will ask you if that paper was also served on you by the officers of the North Alaska Steamship Company on the day of its date, July 8, 1904 (showing). A. It was.

Mr. BOGLE.—I now offer that in evidence as Exhibit "K-3."

(Document received in evidence and marked as above.)

Q. I hand you another paper dated New York, July 8, 1904, addressed to the North Alaska Steamship Company, and I will ask you whether that is a copy of a document served by you or your attorney for you, on the North Alaska Steamship Company on that date. A. It is.

Mr. BOGLE.—I offer that in evidence as exhibit "L-3."

(Testimony of Frank Waterhouse.)

Mr. KING.—Was this supposed to be signed by Frank Waterhouse & Company?

The WITNESS.—Yes.

Mr. KING.—I object to it as irrelevant, immaterial and incompetent.

(Document received in evidence and marked Defendants' Exhibit "L-3.")

Q. (Mr. BOGLE.) I now hand you another paper dated July 9, 1904, addressed to you and signed by the North Alaska Steamship Company, J. B. Leake, Secretary, and I will ask you if that was served on you on the day of its date (showing).

A. Yes, sir.

Mr. BOGLE.—I offer that in evidence as exhibit "M-3."

Mr. KING.—I make the same objection.

(Document received in evidence and marked Defendants' Exhibit "M-3.")

Q. (Mr. BOGLE.) After the service of the papers which you have just identified, did you or your attorney make any adjustment with the North Alaska Steamship Company, or its attorneys, of the matters pending between them.

A. Well, we agreed to release the North Alaska Steamship Company, as I recollect it; they agreed to waive any claims for equity in the steamer.

(Testimony of Frank Waterhouse.)

Q. That was closed up between the attorneys for yourself and the North Alaska Steamship Company?

A. Yes, sir.

Mr. KING.—If he is speaking from hearsay as to the attorneys, I propose to object to it.

Mr. BOGLE.—He knows that the details were closed up.

Mr. KING.—We object to any testimony that is not based on the witness' own knowledge, as hearsay and incompetent.

Q. (Mr. BOGLE.) Do you know of your own knowledge what release or receipts were passed between them?

A. I did know, but I do not recollect now.

Q. Who was present at those various meetings in New York between yourself and those interested in the North Alaska Steamship Company and the Occidental Securities Company?

A. Mr. Rowe, Mr. Leake, Messrs. McKee & Frost, Mr. Arthur Baldwin of the firm of Griggs, Baldwin & Baldwin, attorneys, Mr. W. F. King, Mr. S. C. Mead, Mr. Corwine, and two or three other gentlemen, whose names I do not recollect, who were stockholders in the Occidental Securities Company.

(Testimony of Frank Waterhouse.)

Q. Was General Dodge present at any of those meetings? A. No, sir.

Q. What efforts, if any, were made to communicate with General Dodge, or secure his presence?

A. Mr. Corwine—

Mr. KING.—We want the witness' testimony limited to his own knowledge.

A. (Continuing.) Mr. Corwine endeavored to get in communication with him, and reported at one of the meetings that General Dodge was out of town, and he had been unable to learn of his address.

Mr. KING.—We object to the testimony and move to strike it out on the ground that it is irrelevant, immaterial, incompetent and hearsay.

Q. (Mr. BOGLE.) Did you know General Dodge's address or where he was? A. No, sir.

Q. Did you know where Mr. Pusey, his son in law, was? A. No, sir.

Q. When Mr. Pusey was in Seattle about the first of June, how long did he remain here, after entering into the arrangements which you have heretofore stated? A. A few hours.

Q. Where did he state that he was going from here?

A. He was going to California, and I think he said thence to New Orleans or Mexico.

(Testimony of Frank Waterhouse.)

Q. Do you know, from any communications received from him, when he returned to New York?

A. It was the latter end of July, or August, I forget which. There is a telegram in the files from him; that was the first evidence I had of his return to New York.

Q. I hand you a paper purporting to be a letter written by you to Mr. Pusey, under date of August second, 1904, and I will ask you if that is a copy of the letter which you wrote to him on that date (showing). A. Yes, sir, it is.

Mr. BOGLE.—I offer this in evidence.

(Document received in evidence and marked Defendants' Exhibit "N-3.")

Q. How long did you remain in New York after July 9, 1904?

A. I think I was in New York three or four days after.

Q. I hand you what purports to be copies of telegrams passing between yourselves and representatives of the North Alaska Steamship Company at various times during the spring of 1904, and I will ask you whether those are correct copies of telegraphic communications that passed between you at that time (showing). A. Yes, sir.

Mr. BOGLE.—I offer these in evidence.

(Testimony of Frank Waterhouse.)

Mr. KING.—I make the same objection to them as I made to the exhibits "C" to "I-3," inclusive.

(Document received in evidence and marked Defendants' Exhibit "O-3.")

Q. (Mr. BOGLE.) Mr. Waterhouse, you have heretofore testified in regard to the sale of the "Garonne" to the Merchants' & Miners' Steamship Company. Does that company own the "Garonne" at this time? A. No, sir.

Q. Have you within the last six or eight months sold the "Garonne" for any company that you are connected with? A. Yes, sir.

Q. At what time did you sell it?

A. The 15th of October, 1905.

Q. Was the sale for cash?

Mr. KING.—What is the purpose of this?

Mr. BOGLE.—To show the values.

Mr. KING.—Then I object to it as irrelevant, immaterial and incompetent.

A. Yes, sir.

Q. How much did she sell for?

Mr. KING.—I make the same objection.

A. Thirty-seven thousand five hundred dollars.

Q. (Mr. BOGLE.) Where was she at the time of the sale? A. Genoa, Italy.

(Testimony of Frank Waterhouse.)

Q. She had gone over under a charter, had she?

A. Yes, sir.

Q. Was that the best price which you could obtain for her?

Mr. KING.—I make the same objection.

A. Yes, after a very diligent effort in all the ports of Europe.

Q. (Mr. BOGLE.) Mr. Waterhouse, under this arrangement that was made with Mr. Pusey, have you, either personally or your firm or company, ever received any money from any source whatever that was applicable to this debt of General Dodge covered by that agreement?

A. No, sir. My trusteeship covered the carrying out of the agreement he made with Mr. C. B. Smith, and C. B. Smith failed to carry out any part of that agreement, so that I had no trusteeship to carry out.

Mr. KING.—I move to strike out the latter part of the answer to the question, as not responsive to the question, and as simply a legal conclusion of the witness.

Q. (Mr. BOGLE.) Did C. B. Smith on behalf of the North Alaska Steamship Company, execute any assignment to Mr. Pusey of the freights collectible at Nome on the cargo carried by the "Garonne" on that trip?

(Testimony of Frank Waterhouse.)

Mr. KING.—Is that in writing?

The WITNESS.—Yes, sir.

Mr. BOGLE.—Yes, it is in writing, delivered to Mr. Smith.

(Question repeated to the witness.)

A. Yes, sir.

Q. Do you know who was appointed by Mr. Pusey to receive those freights under that assignment at Nome?

A. Mr. Smith himself.

Mr. KING.—If you are trying to get the contents of that assignment I shall object to it as not the best evidence. You have asked him a question and he has no right, instead of answering it yes or no, he is stating the name of the man, which is not exactly proper—if you have got the assignment and want to put it in evidence that is another thing.

Mr. BOGLE.—We have not got it and we never had it. It was executed in our presence right then and there, and Mr. Smith was appointed the agent.

Mr. KING.—Unless you account for the loss of it, I object to his testifying in regard to it.

Mr. BOGLE.—We never had it.

Mr. KING.—Still, I do not believe it is competent for him to testify about it.

(Testimony of Frank Waterhouse.)

Mr. BOGLE.—It was your people executed the agreement.

Q. Were those papers executed in your presence, in your office? A. They were.

Q. Was that at the time or just preceding the time of the execution of this trust agreement between Mr. Pusey and yourself? A. Yes, sir.

Cross-examination.

Q. (Mr. KING.) You state, in the telegram of February 3, 1904, to Mr. Ferguson, that you were to have a corporation bond guaranteeing the vessel against indebtedness and as security for your notes.

A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. When was the first time that you demanded this bond or security?

A. At the very commencement of our negotiations, at our first offer.

Q. Had you, when you made that demand, that first demand, received any money on account of the purchase price of the steamer? A. No, sir.

Q. Then, any money which you had received on account of the purchase price of the steamer was received after that demand.

A. It was not a demand, it was a condition—it was a conditional sale.

(Testimony of Frank Waterhouse.)

Q. You will answer my questions; I asked you "When you made that demand."

A. I do not understand it when you put it that way.

(Former question repeated to the witness.)

A. I don't know what it means, I cannot answer it.

Mr. KING.—Read back the testimony he has just given on his cross-examination as to what he said about the demand.

(Testimony read by the stenographer.)

Mr. KING.—Now, read him the question—you have testified here that you demanded at the very first a corporation bond in security for your notes—

A. It was a condition of the purchase.

Q. I didn't ask you that.

A. Well, I cannot answer it; I do not know.

Q. You can answer it yes or no.

A. Let it go at that; I cannot answer such a question as that; it is put in such a shape as nobody can answer it. If you ask me sane questions I will give you sane answers.

Q. Did you ever receive this corporation bond?

A. No.

Q. Did you ever receive any security for your notes? A. No.

(Testimony of Frank Waterhouse.)

Q. Did you make more than one request or demand for this corporation bond, or those securities?

A. I made a great many requests.

Q. About how many?

A. I cannot remember, perhaps a hundred.

Q. Was any of those requests made before or after you received any of those payments?

A. Yes, both before and after.

Q. You did receive payments, then, after making this request?

A. We received payments on account of the purchase price.

Q. Well, on account of the purchase price—you state that the North Alaska Steamship Company had possession of the steamer "Garonne" for one voyage to Cape Nome, and from about the middle of March until she left here for Nome, previous to that voyage, during that time you acted as agent for the steamer, didn't you—the Frank Waterhouse Company? A. We acted as traffic agents.

Q. And were paid for your services as such agents? A. Yes.

Q. Or charged them up to the North Alaska Steamship Company. A. Yes, sir.

Q. You also acted as general agent for the vessel in the matter of disbursements during that time?

(Testimony of Frank Waterhouse.)

A. Yes, sir.

Q. And also were paid for that service?

A. Yes.

Q. And advertised the ship under your name as agent and under the name of the North Alaska Steamship Company as owners during that time, didn't you?

A. Yes, sir.

Q. When Mr. Pusey called on you in the latter part, or nearly the last day of May, was that the first time you had heard of General Dodge?

A. No; I heard of General Dodge, as I testified to already, sometime earlier in May.

Q. Sometime earlier in May?

A. Or in April, I forget which.

Q. You heard of him through Smith the first time, then? A. Yes, sir.

Q. And was that the first time you had heard of him? A. Yes, sir.

Q. You did not know who he was, by repute, before that time?

A. I never heard of such a man.

Q. These exhibits that have been put in here by your counsel, particularly the various exhibits from "C" to "1-3"; do you know whether or not any of these were ever known by or communicated to Gen-

(Testimony of Frank Waterhouse.)

eral Dodge—the contents of those various letters or telegrams?

A. I do not know anything about that.

Q. You did not communicate any of them to him?

A. No, I did not know him at the time.

Q. As far as you know they were not?

A. As far as I know they were not.

Q. How much money had you received, do you know, on account of the purchase price of the "Garonne" on or about May 25th or 26th, 1904, when, in accordance with these telegrams, you threatened to cancel the contract of purchase?

A. About $35,000.

Q. Then since that time then you received some more money on account of the purchase price of the ship, did you? A. Yes, sir.

Q. You stated that you first met Charles B. Smith in the Burke building on May 30th, 1904.

A. I would like to correct that statement; it was made entirely by mistake; I think I did meet Mr. Smith in New York in April, in the office of the Occidental Securities Company.

Q. Had you any correspondence with Mr. Smith prior to that time, about meeting him?

A. Yes, sir.

Q. You had correspondence with Smith practically on the inception of this contract to purchase the "Garonne," didn't you?

(Testimony of Frank Waterhouse.)

A. No, I think not; nearly all the correspondence was with Mr. J. B. Leake, I cannot remember—I do not remember when the correspondence started with Mr. Smith, but it will show in these files.

Q. Now, you have stated in your direct examination that on May 31st, 1904, at about the time that Pusey arrived in Seattle representing General Dodge, that there was $50,000 due on the purchase price of the boat, and from $30,000 to $35,000 for betterments, repairs and supplies; are you not mistaken in that?

A. My recollection goes that it was in that neighborhood; I think that after June 1st we received about $18,000 on account, but am not at all sure about it. I cannot state positively from recollection.

Q. Referring now to the memorandum which you entered into with Frank S. Pusey as agent for G. M. Dodge, on or about the first of June, or the 2d, when the steamer sailed, and in which you speak about the two mortgages and the agreement to act as trustee, you state, or at least it says in this memorandum statement, "The North Alaska Steamship Company is indebted to said Waterhouse & Company, Incorporated, in the sum of $37,671.46, being the balance due on the purchase price of the steamship 'Garonne,' and also indebted to the said G. M. Dodge in the sum of $10,000 for borrowed money"; that statement as to

(Testimony of Frank Waterhouse.)

the purchase price of the steamer 'Garonne' is correct, is it? A. Yes, it is exactly correct.

Q. You say Pusey at the interview you had with him when he came here, told you that Smith had promised Dodge that the loan of $10,000 should be paid out of the first freight earned by the "Garonne."

A. Yes, sir.

Q. Was Smith present when Pusey told you that?

A. It was told on two occasions; Smith was present once.

Q. Where was it told the second time?

A. In the morning and the afternoon of the same day.

Q. In your office? A. Yes, sir.

Q. In Seattle? A. Yes, sir.

Q. You do not know whether Smith was present in the morning or the afternoon, do you?

A. He was present in the afternoon; not in the morning.

Q. What reply did Pusey make when you told him that you should insist on all the money that she earned being paid to you, to apply first on the bills and second on the account of the purchase price, and would not recognize any agreement between Dodge and Smith? A. I do not remember.

(Testimony of Frank Waterhouse.)

Q. This conversation, however, occurred before this memorandum in which you agree to act as trustee, was drawn up and executed? A. Yes, sir.

Q. When did you first learn that Leake, as representing the North Alaska Steamship Company, declined to execute the mortgage?

A. Sometime about the middle of June.

Q. Did you communicate that information to either General Dodge or Pusey?

A. I do not remember; no, I do not think I did; I do not think I had their address.

Q. You said that when Mr. Mead arrived in Seattle, he conferred with Captain Hastings; now, who was Captain Hastings?

A. One of the officers of the North Alaska Steamship Company.

Q. Do you know what officer he was?

A. No, I do not know what title he held.

Q. Do you know what he did?

A. Yes; he was directing the business in Seattle.

Q. Do you know what the object of Hastings' conference with him was? A. No, sir.

Q. Was this Mr. W. F. King, a member of the Occidental Securities Company?

A. Yes, sir.

Q. And of the North Alaska Steamship Company.

(Testimony of Frank Waterhouse.)

A. Well, I suppose he was, because the North Alaska Steamship Company was owned by the Securities Company. I think he was a stockholder in the Securities Company.

Q. He was the chief objector to anything further being done by the North Alaska Steamship Company towards acquiring the "Garonne"?

A. Oh, no; on the contrary, he would have been very glad indeed to have seen them able to place themselves in a position to have completed their purchase. He had a considerable sum of money invested in it.

Q. You said that Mr. Corwine endeavored to get into communication with General Dodge. What endeavors did he make to your own knowledge?

A. I have no knowledge of it at all; simply—

Q. Simply what he told you? A. Exactly.

Q. That is all you now of any efforts to communicate with General Dodge about that time?

A. Just what I heard him say.

Q. Referring to Defendants' Exhibit "N-3," a letter to F. S. Pusey addressed 101 Broadway, New York, and dated Seattle, August 2d, 1904; how did you ascertain Mr. Pusey's address at 101 Broadway, New York? A. What is the date of it?

Q. August 2d, 1904.

(Testimony of Frank Waterhouse.)

A. That is in reply to a letter I received from him?

Q. That is in reply to a letter you received from him. A. Yes, well—

Q. Is it not in reply to a telegram which you received from him?

A. I don't know—(referring to document); yes, it is.

Q. Then you wish to correct that statement and say it is in reply to a telegram received from him.

A. It is in reply to a telegram.

Q. This letter came back to you undelivered, didn't it?

A. (Referring to document.) I do not remember whether that was the one or not. One letter I wrote to him came back—I cannot recollect whether that was the one or not.

Q. You cannot recollect whether that was the one or not? A. No.

Q. Why did it come back?

A. It was not delivered.

Q. Why was it not delivered?

A. I presume the address was wrong.

Q. Are you acquainted with the handwriting of J. P. Townsend, the treasurer of Frank Waterhouse & Company? A. Yes, sir.

(Testimony of Frank Waterhouse.)

Q. I hand you a paper marked for identification as Plaintiff's Exhibit No. 24 (showing) and I will ask you whether that is in the handwriting of J. P. Townsend.

A. Yes, sir.

Q. I will ask you if that letter which I have referred to, under date of August 2d in that exhibit 24, is your letter of August 2d to F. S. Pusey, which you have testified about and which is marked Defendants' Exhibit "N-3"—and I will state that I have the original letter if you have any doubt about it—it is the letter which came back and here is the envelope if you want any more evidence.

A. That was the letter that is referred to in this one of Mr. Townsend's.

Q. Then the letter which is marked Defendants' Exhibit "N-3," addressed to F. S. Pusey at 101 Broadway, is the letter that was returned because it was wrongly addressed?

A. Evidently so, yes, sir.

Q. And, therefore, did not reach Mr. Pusey until after it left Seattle on August 19, 1904.

A. That is so.

Mr. KING.—I offer in evidence the letter of Townsend and ask that it be marked as exhibit "No. 24."

(Testimony of Frank Waterhouse.)

(Document received in evidence and marked "Complainant's Exhibit No. 24.")

Q. (Mr. KING.) You speak here in this letter of August 2d, 1904, to Pusey, being Defendant's Exhibit "N-3"; "I was obliged to take back the steamer 'Garonne' and assume the indebtedness which the North Alaska Steamship Company had loaded her with, amounting to almost $35,000. I took the steamer back and assumed the indebtedness and subsequently sold her to another corporation"; has that reference to the sale to the Merchants' & Miners' Steamship Company? A. Yes, sir.

Q. And is that the indebtedness which you speak of assuming; is that the indebtedness which was paid or partially paid by the $30,000 furnished by the Merchants' & Miners' Steamship Company, or by Mr. King?

A. Yes, sir, it was paid with that money.

Q. When did you leave New York in 1904?

A. The 10th or 12th of July, I do not remember exactly.

Q. You stated in your direct examination that the Merchants' & Miners' Steamship Company does not own now the "Garonne"? A. No.

Q. When did they sell her?

A. April, 1905, I think.

(Testimony of Frank Waterhouse.)

Q. April, 1905—to whom did they sell her?

A. The White Star Steamship Company.

Q. Are you a stockholder in the White Star Steamship Company? A. I am.

Q. Were you at the time the "Garonne" was sold to her? A. I was.

Q. Are you the principal stockholder?

A. I am at this time.

Q. Were you at that time? A. No.

Q. Were you president or an officer of the company at that time? A. I was.

Q. What office did you hold? A. President.

Q. Of the White Star Steamship Company?

A. Not at the time the steamer was sold.

Q. You are the president now? A. Yes.

Q. What office did you hold at the time the steamer was sold? A. None.

Q. Simply stockholder? A. Yes.

Q. What was the steamer sold to the White Star Steamship Company for?

A. Stock in the White Star Steamship Company.

Q. How much stock?

A. Ninety thousand dollars.

Q. That was received by Frank Waterhouse & Company?

A. No; it was received by the Merchants' & Miners' Steamship Company.

(Testimony of Frank Waterhouse.)

Q. And the Merchants' & Miners' Steamship Company now are out of existence.

A. Yes.

Q. And what became of that stock, then, on the dissolution of the Merchants' & Miners' Steamship Company?

A. That stock was divided; the stock in the White Star Steamship Company was accepted by the stockholders—by the individual stockholders in the Merchants' & Miners', in lieu of the Merchants' & Miners' Steamship Company stock.

Q. Share for share?

A. Oh, no, not share for share.

Q. Then, in what proportion was it accepted?

A. I do not remember.

Q. Then she was sold by the White Star Steamship Company?

A. She was sold by the White Star Steamship Company to parties in Genoa.

Q. Then she was chartered by the White Star Steamship Company to the Russian Government.

A. No, sir.

Q. What was she doing during the time she was with the White Star Steamship Company?

A. A part of the time she was lying idle alongside of the dock; part of the time she was on the way crossing the Pacific to engage in a charter to

(Testimony of Frank Waterhouse.)

carry troops from Shanghai to Odessa; part of the time she was carrying troops from Shanghai to Odessa; part of the time she was lying in the harbor of Theodosa, idle; part of the time she was on the route between Theodosa and Genoa.

Q. Then she never was under charter to the Russian government? A. No, sir.

Q. Didn't she have pretty bad weather out there; didn't she have bad weather going out there?

A. No.

Q. Did she meet with any vicissitudes to your knowledge? A. Out in the Orient?

Q. Yes.

A. No. You mean affecting the steamer?

Q. Yes.

A. No, sir. You mean affecting the condition of the steamer?

Q. Yes.

A. No, sir. Crossing the Pacific from Seattle to Kobe she got in a blow that necessitated repairs, amounting to some $8,000 and which were made in Kobe before she proceeded to Shanghai, but nothing else. She had good weather as far as I know and she was in good condition throughout the voyage.

Q. Who is S. A. Serebrevik?

A. He is a Russian.

(Testimony of Frank Waterhouse.)

Q. Isn't he the agent of the Czar of Russia?

A. Not that I know of—I never heard it.

Q. Didn't you testify that he was agent of the Czar then, in the suit between yourself and Barneson—Hibbard & Company?

A. No, sir, I never testified to anything of the kind. I have not testified at all in that suit.

Q. That charter party provided that the vessel be brought back to Seattle? A. Yes, sir.

Q. Why was not that done?

A. The charterer failed to perform his obligation.

Q. He abandoned the vessel in the Black Sea, didn't he?

A. He abandoned his charter, yes, sir.

Q. And you had to take possession of her again in the Black Sea, didn't you? A. Yes, sir.

Q. When you were first told that Dodge was contemplated as security for the balance due on the steamer, did you make any inquiry as to his financial condition or responsibility? A. Yes, sir.

Q. When was that?

A. I do not remember the date.

Q. As near as you can place it.

A. I have no idea what it was.

Mr. BOGLE.—That telegram is in evidence.

A. (Referring to telegram.) May 23, 1904.

(Testimony of Frank Waterhouse.)

Q. In the meetings held in New York, concerning which you have testified in the early part of July, 1904, didn't you refuse to take back the steamer and release the North Alaska Steamship Company unless this indebtedness was paid—I am speaking now of the claims and things against the steamer?

A. I don't remember.

Q. Didn't you, as a fact, have an arrangement with Mr. W. F. King, and those associated with him, that they would furnish enough money to pay those claims before you would consent to accept the ultimatum of the North Alaska Steamship Company and take the steamer back and release them.

A. No, sir.

Q. That agreement with King and his associates, by which he was to advance $30,000, then, was not made until after you got the release from the North Alaska Steamship Company?

A. To the best of my recollection it was not.

Mr. KING.—I cannot find what I am looking for, but perhaps you can tell me, Mr. Bogle. Is there any dispute about the fact that this statement furnished by Townsend is not correct?

Mr. BOGLE.—Anything furnished by Townsend is correct.

Mr. KING.—I refer to this (referring to Complainant's Exhibit "No. 19."

(Testimony of Frank Waterhouse.)

Mr. BOGLE.—That is correct.

Mr. KING.—Then there will be no contest on that.

Mr. BOGLE.—No.

Q. (Mr. KING.) How much did you say the bill of repairs at Kobe was for the "Garonne"?

A. I do not remember; six or seven thousand dollars.

Q. It was not $16,000? A. No, sir.

Q. You do not make an insurance claim for damages for $16,000? A. No, sir.

Q. Or anyone on behalf of the boat?

A. No, sir.

Q. Do you know who Plaskett is?

A. Yes.

Q. He was chief engineer on that voyage, wasn't he? A. Yes, sir.

Q. Then you would say that his statement that there were $16,000 of repairs, and that the boat was badly stove up when she reached Kobe is not correct? A. Absolutely incorrect.

Mr. BOGLE.—There is no evidence that he ever made any such statement, and I object to the examination as assuming that he did.

Q. (Mr. KING.) Do you know when she reached Odessa?

(Testimony of Frank Waterhouse.)

A. No, sir, I do not remember.

Q. Do you know whether or not she reached Odessa when there was trouble with the revolutionists in Russia; the naval revolutionists?

A. She did.

Q. And she went from Odessa to Theodosa?

A. Yes, sir.

Q. Where is Theodosa?

A. About 100 miles from Odessa, on the Black Sea, eastward.

Q. And from there she went to Genoa?

A. Yes.

Q. As a matter of fact, wasn't she sold to be broken up? A. Yes.

Q. Why didn't she come back to Seattle?

A. Because the charterer did not bring her back and she was not worth the company bringing her back—we could not afford it.

Q. Wasn't she worth more in Seattle than she would be in Odessa, in your judgment?

A. No, I do not think she would sell for more.

Q. Why?

A. Because to start with, she was nearly 40 years old and the only employment she could be used in Seattle for, was for three voyages a year up to Cape Nome, and that is a very unprofitable condition of affairs; she never made any money, or but very

(Testimony of Frank Waterhouse.)

little money, if any, running to Cape Nome. She was a white elephant on my hands ever since she got through with the transport service. I tried repeatedly to sell her in every port almost in the United States. Nearly every broker in the country had her and we never got an offer for her. The only chance we ever had to sell her at any time was to the North Alaska Steamship Company. She was simply a white elephant.

Q. You did not tell them she was a white elephant, did you?

A. No, sir, I had her for sale.

Q. You did not tell them she was unprofitable?

A. No, sir. Sellers don't usually give the worst side of it.

Q. You made reports to the contrary, didn't you, right here in these telegrams put in evidence today?

Mr. BOGLE.—If there is anything represented in the telegrams, they show for themselves, and I object to the witness being interrogated as to the contents of the telegrams.

Q. (Mr. KING.) You did not consider then that she was worth any more in Seattle than she was in Odessa after she had been through this hard voyage to Japan.

(Testimony of Frank Waterhouse.)

A. That didn't do her a particle of harm; she was probably better when she left Japan than when she left Seattle. She was put in first-class repair as far as possible to put a vessel that is 40 years old in shape. I do not think she could have been sold here at all, to start with. We tried repeatedly to sell her, but we could not even sell her for breaking up purposes here. There is no market for anything of the kind.

Q. That was the reason you could not sell her?

A. The vessel, at the time she was sold, was a very poor piece of property.

Q. And practically when you received forty-seven odd thousand dollars for her from the North Alaska Steamship Company, you received all that she was worth?

A. Well, that year there was a large business to Alaska.

Q. Well, didn't you?

A. No, sir, not to us at that time we didn't.

Q. She was worth fully $85,000 to you at that time, was she?

A. She was worth whatever we could get out of her, and we sold her for $85,000.

Q. But she was worth more than $47,000 you think—in other words, when you got $47,000 you did

(Testimony of Frank Waterhouse.)

not get more than she was worth—I understand you to testify to that just now?

Mr. BOGLE.—I object to that as utterly irrelevant and immaterial and it does not affect this defendant in any way or this complainant, or affect any of the issues in this case.

A. I would not have paid $47,000 for the ship.

Redirect Examination.

Q. (Mr. BOGLE.) Mr. Waterhouse, you stated that you were in New York in April, 1904.

A. I think I was.

Q. I hand you a bill of sale from Frank Waterhouse & Company, Incorporated, to the North Alaska Steamship Company, dated the 8th day of April, 1904, and I call your attention to the telegram from the assistant cashier of the Chase National Bank to you, under date of April 28th, 1904, (showing) and I will ask you whether on that trip to New York in April, 1904, you made a demand on the North Alaska Steamship Company to take title to this vessel and carry out their contract, by furnishing you a mortgage on the vessel and notes, with a bond guaranteeing the vessel against liens and other satisfactory security, according to their contract?

A. I did, sir.

Q. What was the result?

(Testimony of Frank Waterhouse.)

A. The result was that they were unable at the time to comply with the terms of the sale and they requested that the bill of sale be deposited with the Chase National Bank in New York.

Q. (Mr. KING.) Do you mean the North Alaska Steamship Company by "they"?

A. The North Alaska Steamship Company. So that it would be available for them to take up just as quickly as they could put themselves in shape, for completing the contract of purchase.

Mr. BOGLE.—I offer this bill of sale in evidence.

(Document received in evidence and marked Defendants' Exhibit "P-3.")

Q. (Mr. KING.) After this understanding which you have just testified about, did you receive any money on account of the purchase price of the ship? A. After this?

Q. Yes, after this? A. Oh, yes.

Q. You did? A. Oh, yes.

Q. About how much?

A. I cannot remember. I do not know what we got up to that time.

Q. But you did receive money after that?

A. Certainly.

(Testimony of Frank Waterhouse.)

Q. (Mr. BOGLE.) Does the statement furnished counsel in this case by Mr. Townsend, your cashier, show the dates of the various receipts of the money by you from the North Alaska Steamship Company? A. Yes, sir.

Q. When you speak of not knowing what moneys you received, you mean you have no means from your personal recollection of stating them.

A. I cannot remember—I can find it.

Q. Your books show?

A. Certainly, and the statement here furnished shows it.

Mr. KING.—You do not dispute that is a correct statement?

A. No, sir, I admit it.

(Testimony of witness closed. Whereupon the further hearing is adjourned to be taken up by agreement between the parties.)

April 27, 1906.

Continuation of proceedings pursuant to agreement.

W. H. BOGLE, appearing as a witness in behalf of defendant, being first duly cautioned and sworn, testified as follows:

Mr. KING.—We object to the taking of any testimony at this time on the ground that it is beyond

(Testimony of W. H. Bogle.)

the time allowed by the court. I shall object to any testimony in regard to efforts to communicate with General Dodge and I am objecting to the time being extended for that reason. I do not want to object to your testimony here now, because I always understood you were going to testify, but certainly I think if you wanted that testimony you could have got it during the time Mr. Waterhouse was away, from the 10th of January. I shall not insist on any objection to this testimony strenuously in court, but I simply want to preserve my rights.

Mr. BOGLE.—During the years 1904-05, and for several years prior thereto, I was secretary of Frank Waterhouse & Company, Incorporated, and was, and had been, attorney for the company since its organization.

In January, 1904 Mr. Waterhouse informed me that one Captain W. H. Ferguson was negotiating for the purchase of the steamship "Garonne" from Frank Waterhouse & Company, Incorporated, and I conferred with him day by day as those negotiations progressed, and assisted him in formulating the terms of the letter dated January 26, marked Defendants' Exhibit "B" to the deposition of Frank Waterhouse herein; and also in formulating the telegram from Mr. Waterhouse to Captain Ferguson

(Testimony of W. H. Bogle.)

under date of February 3, 1904, and marked Defendants' Exhibit "A" in this case.

Upon the payment of the $1,000 cash made upon the acceptance of this proposition by W. H. Ferguson and his associates, a receipt was executed embodying the same terms as those mentioned in this telegram, with the additional clause that any payments made by the purchaser should be forfeited if the purchaser failed to carry out and complete the contract price.

Mr. KING.—We object to the testimony and move to strike it out on the ground that the receipt itself is the best evidence and it has not been produced, nor has the failure to produce it been accounted for.

Mr. BOGLE.—(Continuing.) I was acquainted with the general progress of the dealings between Mr. Waterhouse and Captain Ferguson and the North Alaska Steamship Company, which company turned out subsequently to be the party for whom Captain Ferguson was acting, but I had no direct communication with them myself, except as Mr. Waterhouse advised with me from time to time as to the status of things. At one time, during the month of April or May, I wired to the North Alaska Steamship Company that unless they promptly complied with the—

(Testimony of W. H. Bogle.)

Mr. KING.—Have you got the telegram?

Mr. BOGLE.—I do not know whether I have got the wire here or not. Their answer is here. I will look it up and see (examines documents). On or about the 25th of May, 1904, I wired to the North Alaska Steamship Company under instructions from Frank Waterhouse & Company, to the effect that—

Mr. KING.—I make the same objection, as not the best evidence.

Mr. BOGLE.—(Continuing.) —to the effect that steps would be taken at once to forfeit their contract to purchase, or option, unless they complied with the terms of it by taking over the title to the vessel and executing the securities required to be executed by the contract; and received the answer, under date of May 25, from Charles B. Smith, which is marked Defendants' Exhibit "J-1" to the deposition of Mr. Waterhouse.

On or about the 1st of June, 1904, Mr. Charles B. Smith reached Seattle from New York on his way to Alaska. The steamship "Garonne" at that time was loading and about ready to sail on her first voyage to Nome. Mr. Waterhouse had notified the North Alaska people that he would not permit the vessel to sail until they complied with the terms

(Testimony of W. H. Bogle.)

of their contract. At the same time Mr. F. S. Pusey—

Mr. KING.—I understand that you are testifying to this of your own knowledge that Waterhouse notified them, or simply as to what Waterhouse told you?

Mr. BOGLE.—(Continuing.) I am referring to the written notification which appears in the telegrams and communications which are on file as exhibits to Mr. Waterhouse's deposition, and to what Mr. Waterhouse informed me at the time, and I am not sure that I was present when he gave the notice to Mr. Smith. I am not able to say definitely whether I was or not.

Mr. KING.—I move to strike out any testimony that is not within the witness' personal knowledge, or any statement as to any conversations or notices, at which he was not present.

Mr. BOGLE.—(Continuing.) I was requested, on or about the first or second of June, 1904, to go to Mr. Waterhouse's office to meet Mr. Pusey and also Mr. Charles B. Smith, the president of the North Alaska Steamship Company. When I first went to the office, Mr. Smith was not present, but Mr. Pusey was, and there was a general conversation between

(Testimony of W. H. Bogle.)

Mr. Waterhouse, Mr. Pusey, and myself with regard to the situation. It was stated by Mr. Waterhouse to Mr. Pusey that there was a balance due on the purchase price, of some thirty-seven or thirty-eight thousand dollars. He gave the exact figures as they appeared on his books, but I do not remember the odd amount. It was explained to me that Mr. Pusey represented General G. M. Dodge of New York, and that General Dodge held a claim against the North Alaska Steamship Company for some $10,000. Mr. Waterhouse and Mr. Pusey had been in conference prior to the time I was called in, and they had been securing data from the representatives of the North Alaska Steamship Company, particularly from Mr. Hastings. It seemed, from the representations that had been made to them of the amount of freight—

Mr. KING.—We object to this line of testimony, as appearing to be out of the witness' knowledge.

Mr. BOGLE.—(Continuing.) It seemed from the reports and data furnished and in the possession of Mr. Waterhouse and Mr. Pusey at that time, that there would be some considerable amount—my recollection is something like $18,000—realized from the freights on the cargo then on board the "Garonne," and which would be applicable to the payment of the bills that had been incurred by the North Alas-

(Testimony of W. H. Bogle.)

ka Steamship Company for some repairs and alterations on the ship and for supplies for the ship. The amount of those outstanding bills had not been definitely ascertained, but from the reports given by Captain Hastings and from the accounts which had been rendered and which were then in the hands of Mr. Townsend, the treasurer of Frank Waterhouse & Company, it was estimated by Mr. Waterhouse that the outstanding bills would not exceed fourteen or fifteen thousand dollars. Mr. Pusey was present and saw the statements and data and reports that Mr. Waterhouse had upon which those estimates were based, and the estimates seemed to correspond with the information he had received from the North Alaska Steamship Company people. Mr. Waterhouse and Mr. Pusey explained to me that Mr. Smith, on behalf of the North Alaska Steamship Company, had agreed to execute a mortgage upon the steamship "Garonne" to secure the balance of the purchase money due Mr. Waterhouse, amounting to something over $37,000, and to execute a second mortgage upon the steamer to secure the $10,000 claimed to be due General Dodge, and we had conferences as to the best shape in which to put these securities. They stated that Mr. Smith had reported to them that the New York office of the

(Testimony of W. H. Bogle.)

North Alaska Steamship Company, or his New York associates there, were prepared to advance whatever amount of money might be necessary, if any should prove to be necessary, to pay any balance that might be owing for supplies and repairs and betterments to the ship, so that the two mortgages would represent the only indebtedness against the ship.

It was agreed at that time that, in view of these statements, they would make the settlement with the North Alaska Steamship Company on the basis I have just outlined, of taking mortgages for the balance due, and, on my suggestion, it was agreed that instead of taking two mortgages, I should prepare one mortgage, which would provide for a first lien in favor of Waterhouse & Company for the amount due them, which amounted to something over $37,000, and in the same instrument provide for a second lien in favor of General Dodge for the $10,000.

Either on that afternoon or the next morning I met Mr. Waterhouse and Mr. Pusey again in Mr. Waterhouse's office, and Mr. Charles B. Smith was present. At that time further reports of outstanding indebtedness had come in, which indicated that the estimate of fourteen or fifteen thousand dollars would not cover the outstanding bills. Mr. Smith stated that his New York associates had confidently expected the receipts from the freight and passen-

(Testimony of W. H. Bogle.)

ger money would not only pay all outstanding bills for supplies and repairs, but would give a considerable surplus, which could be applied in payment, or part payment, of the balance due Mr. Waterhouse, and that he had been very much surprised on reaching Seattle and going over the books with Captain Ferguson and Mr. Hastings, to find that they had expended such large sums in supplies, betterments and repairs, and that it would be necessary for him to wire the situation to his New York associates and explain the condition in which he found things here, and to give them some forty-eight hours to make their arrangements to raise the money to pay off the balance of the lien debt. He stated, however, that they would pay them at once, that is, within forty-eight hours after his wire reached there, and that they would be prepared to pay one-half of the balance due Mr. Waterhouse in ten days, and the other half in twenty days, and that they would meet Mr. Dodge's claim within a short time thereafter. It was then agreed between Mr. Smith, Mr. Waterhouse, Mr. Pusey and myself, that Mr. Smith should inform his associates in New York and arrange for them to wire such an amount of money to Seattle as might be necessary to pay any balance due on these lien debts, and Mr. Waterhouse agreed that, instead of making his debt due in ten and twenty

days, he would make it due in twenty and forty days, and Mr. Pusey arranged with Mr. Smith that his debt should become due in sixty days, and Mr. Waterhouse withdrew any objection to the sailing, under that understanding.

I prepared the mortgage in accordance with this agreement, and prepared two notes dividing Waterhouse & Company's debt into two parts, one of them payable in twenty days and the other in forty days. I also prepared a bill of sale to be executed by Frank Waterhouse & Company, and to be delivered when the mortgage was executed. Mr. Pusey and Mr. Waterhouse then explained to me that Mr. Smith had transferred to Mr. Pusey, either as security or as part payment—I understood as security—for the Dodge debt a considerable amount of the freight money that would be payable at Nome upon the arrival of the ship there; the amount was stated to be approximately $10,000, although I did not see either the assignment or a list of the bills which were assigned. It was stated to me also at the time that Mr. Pusey had appointed Mr. Smith as his agent at Nome to collect these freight moneys for General Dodge, and to remit them to the Seattle National Bank, in Seattle, for General Dodge's benefit. They also told me that Mr. Pusey had requested Mr. Waterhouse to represent his interests as trustee at Seat-

(Testimony of W. H. Bogle.)

tle in the receipt of this money, or having it forwarded from the Seattle National Bank to General Dodge, and in the event there should ever be any occasion to foreclose this mortgage which was to be taken, that he would act as trustee for General Dodge in that matter; the idea being that it would avoid some trouble to General Dodge and would simplify any action which might become necessary in foreclosing the mortgage.

Mr. KING.—I move to strike that out as being a conclusion of the witness—I move to strike out all the answer beginning with the words "the idea being."

Mr. BOGLE.—(Continuing.) Mr. Pusey, as I recall the matter now, had drawn up a memorandum by which Mr. Waterhouse was named to act as trustee for General Dodge, and Mr. Waterhouse asked me whether there was any objection to his doing so. I looked over the agreement, as prepared by Mr. Pusey, and stated that I saw no objection to it, provided an additional clause was added which exempted him from any liability as trustee so long as he acted in good faith. Mr. Pusey said it was satisfactory, and I accordingly added that clause to the agreement, which was then written out and signed by Mr. Pusey and Frank Waterhouse. Pursuant

(Testimony of W. H. Bogle.)

to that a note was taken from the North Alaska Steamship Company to Frank Waterhouse & Company, as trustee for General Dodge, for the $10,000, payable sixty days after date. Frank Waterhouse & Company thereupon signed a bill of sale for the "Garonne" to the North Alaska Steamship Company. Mr. Charles B. Smith, as president of the North Alaska Steamship Company, signed the three notes, two to Frank Waterhouse & Company, payable in twenty and forty days, aggregating something over $37,000, and one in favor of Frank Waterhouse & Company, as trustee, for $10,000, payable in sixty days. Mr. Smith, as president of the North Alaska Steamship Company, also signed the mortgage which I had drawn securing those debts. I stated at the time to both Mr. Smith and Mr. Pusey that it would be necessary to have the mortgage signed by the secretary of the company, who was then in New York, to have the seal attached to it, and to have the execution of the mortgage approved or authorized by the Board of Directors of the North Alaska Steamship Company. It was then agreed between us that the bill of sale and the mortgage should be forwarded by Frank Waterhouse & Company to the Chase National Bank, in New York, with instructions to that bank to deliver the bill of sale when the execution of the mortgage was completed

(Testimony of W. H. Bogle.)

by proper resolution of the Board of Directors and by the signature of the secretary and the affixing of the seal. My recollection is that three notes, which were signed by Mr. Smith for the North Alaska Steamship Company, were left in the possession of Frank Waterhouse & Company to await the return of the mortgage after it should be executed. Mr. Smith stated that he would immediately wire his New York associates the condition of things, and ask them to put themselves in readiness to raise whatever money was necessary to pay any balance on the supply bills and lien debts against the ship. That was the situation of things when the "Garonne" sailed for Nome. The bill of sale to the "Garonne" was executed by Frank Waterhouse & Company on the second day of June, 1904. I have that original bill of sale in my possession, and will exhibit it to counsel and make it an exhibit to my testimony if he desires to do so.

Mr. KING.—I do not desire it as an exhibit.

Mr. BOGLE.—(Continuing.) The mortgage is not in my possession. It was sent to New York under the arrangement above stated, and I do not recall that I have seen it since it was returned from the bank. I presume it was in the possession of Frank Waterhouse & Company.

(Testimony of W. H. Bogle.)

Mr. King, the solicitor for the complainant in this case, has just called my attention to Complainant's Exhibit No. "4" in this case (showing); that exhibit is a copy of the mortgage I have referred to, except that the original was signed "North Alaska Steamship Company, by Charles B. Smith, President"; the secretary's signature being left blank; while the copy which Mr. King has exhibited in this case does not contain the signature of Mr. Smith, and I presume that this is a copy of the mortgage which was furnished to Mr. Pusey by me before Mr. Smith signed it.

Mr. KING.—That is what he claims it to be.

Mr. BOGLE.—(Continuing.) Mr. Pusey left Seattle, either on the day or the day following the signing of these papers, and I have never seen him since.

Sometime about the middle of June a Mr. S. C. Mead from New York appeared in Seattle and represented that he was one of the parties interested in the North Alaska Steamship Company, and he was here to look into the condition of affairs and make a report to the other interested parties in New York. He spent several days here—my recollection is about one week. By that time practically all of the outstanding bills against the "Garonne" for supplies

(Testimony of W. H. Bogle.)

and material had been handed in, and it appeared that the amount thereof was much larger than had been estimated at the time Mr. Pusey was here on June 1st and 2d. After Mr. Mead had made an investigation in Seattle and obtained such information as he was seeking, he requested Mr. Waterhouse and myself to return with him to New York, in order that a full explanation of the situation might be made to all of the parties interested there, and that some adjustment of settlement might be reached, and, on Mr. Waterhouse's request, I went with him and Mr. Mead to New York. We reached there the latter part of June or the first of July. On the afternoon of the day that we arrived Mr. Mead arranged for and called a meeting of the parties interested in the North Alaska Steamship Company and in the Occidental Securities Company, which was also a New York corporation, and which they represented, held the stock of the North Alaska Steamship Company. That meeting was held in the office of the Merchants' Association of New York, Mr. Mead being secretary of that association. There was present Messrs. McKee & Frost, attorneys for the North Alaska Steamship Company and Occidental Securities, Mr. J. B. Leake, who was secretary of one or both of those companies, Mr. W. H. Rowe, Mr. William F. King, a Mr. Corwine, Mr. Arthur J. Bald-

(Testimony of W. H. Bogle.)

win, an attorney who represented some of the parties interested in these companies, and also several other gentlemen whose names I either did not hear, or if I did, I have forgotten. At this meeting, Mr. Mead made a report of the result of his investigations of the condition of affairs at Seattle. He reported the amount of the balance due on the purchase price and the approximate amount of the outstanding bills for supplies, materials, etc. Mr. Waterhouse furnished such additional information as was called for by any of the parties at the meeting. In the course of the discussion it developed that there was a lack of harmony among the parties in interest there. Mr. King and some of his associates charged the officers of the Occidental Securities Company and the North Alaska Steamship Company with having procured his subscription by false representations as to the title to the ship and the condition of the company. This wrangle continued until late in the afternoon, and the meeting was finally adjourned over, either the next day or the second day thereafter. We continued in negotiating, endeavoring to get those people to make some arrangement that would raise the money to pay off the balance due on the ship and made various propositions, one of which was that if they would raise cash to pay these lien debts

(Testimony of W. H. Bogle.)

against the ship, that Mr. Waterhouse would take the notes of the company, secured by a mortgage on the vessel for a much longer time than that mentioned in the agreement made with Mr. Pusey—my recollection is that Mr. Waterhouse proposed to extend his debt to six, twelve and eighteen months, if all other debts against the company should be paid off by the parties interested, so that his debt be the first lien against the ship, and the company would be in a sound financial condition. That proposition was entertained for several days, and the parties were negotiating to raise the money with which to carry it out. Mr. King at one time indicated that he and his associates would raise the money to pay off those debts and take a second mortgage upon the ship for the amount thereof. During the time these negotiations were going on a great many people in New York, who were strangers to me, appeared one time or another in these various meetings, most of them were parties who claimed to be creditors of either the North Alaska Steamship Company or the Occidental Securities Company, and claimed to have some kind of assignments or securities, which gave them some kind of a claim against the "Garonne"; one of the parties who claimed to be a creditor was represented by his attorney who came around to see me and stated he had a maritime lien upon the "Ga-

ronne" for his client by reason of the fact, as he claimed, that the money advanced by his client had been used in paying for supplies and material which were liens against the ship. I inquired during the times these negotiations were going on, whether General Dodge could be induced to attend any of the meetings, or could be reached. Mr. Corwine told me that he was under the impression General Dodge was out of the city, but that he would make inquiries and let me know the next morning. The next day either Mr. Corwine or Mr. Mead, I think it was Mr. Corwine, reported that General Dodge was out of the city, and my recollection is that he was represented to be abroad; at any rate the report was that he was out of the city and could not be reached. After that I made no further efforts to reach him. I did, at various times in those meetings, request or suggest to the Occidental Securities Company people and the North Alaska Steamship Company people, that all parties interested as creditors or otherwise, should be consulted with the view to getting them all united and raise the money to pay off those debts. On either the 7th or 8th of July we held a meeting at the said Merchants' Association office at which Mr. King represented that he would not undertake to raise the money estimated to be about $35,000, to pay off these lien debts. He represented that the

(Testimony of W. H. Bogle.)

Occidental Securities Company, in which he was interested, not only held the stock of the North Alaska Steamship Company, whose only property was the interest in the steamship "Garonne," but that it had some six or eight, or possibly more mining companies in the Nome, Alaska district, which had been located and inaugurated by Mr. W. H. Rowe, and they considered that these mining properties afforded a prospect of being very valuable properties after they were developed. He said that he and his particular associates had already advanced some $30,000 to the Occidental Securities Company, and that it would take $30,000 more to buy the dredgers and other machinery that was necessary for developing and working these mining properties; that the company was looking to him and his particular associates to raise that money; that he had to elect whether he would raise the money to pay off and save the "Garonne" to the company, or raise the money to purchase the machinery and develop these mining properties, as he was not able, or not willing, to undertake to raise the amount which would be necessary for both enterprises, and after consultation with the parties whom he had expected to be associated with him in these future advances, they had concluded that the mining enterprise afforded

(Testimony of W. H. Bogle.)

the better prospect of satisfactory returns, and that he, therefore, would decline to advance any more money on the steamship end of the business. The other parties interested in the Occidental Securities Company and the North Alaska Steamship Company stated that that practically put an end to any hope of their raising any more money. I then served notice on the North Alaska Steamship Company that they had not kept, and had forfeited the terms of their contract, and that unless they immediately complied with their contract Frank Waterhouse & Company would declare the payments theretofore made by them forfeited and their right to purchase forfeited; a copy of that notice is filed with the deposition of Frank Waterhouse and is marked as Defendants' Exhibit "L-3." That, as I now recall, was on the 8th of July, it may have been on the 7th. On the morning of the 9th of July, Mr. McKee, the attorney for the North Alaska Steamship Company, served on me a letter, a copy of which was filed with the deposition of Mr. Waterhouse and marked Defendants' Exhibit "M-3," the letter being signed "North Alaska Steamship Company, by J. B. Leake, Secretary." At the same time or immediately preceding or following the service of this letter, he also furnished me a copy of the resolu-

(Testimony of W. H. Bogle.)

tion of the Board of Directors under date of July 8th, a copy of which is filed as an exhibit to Frank Waterhouse's deposition and marked as Defendants' Exhibit "K-3." After the receipt of this notification from Mr. McKee, I took the matter up with him, and after some considerable discussion he agreed that he would recommend to his company not to assert any claim for return of the moneys that they had paid, nor to engage in any litigation about it, provided full receipts were exchanged between Frank Waterhouse & Company and the North Alaska Steamship Company, so that Waterhouse should not assert any further claim against the company and the company would not assert any further claim against Frank Waterhouse & Company. He afterward, and during the same day, furnished me with a copy of the resolution of the Board of Directors, under date of July 9th, a copy of which is filed with Mr. Waterhouse's deposition and marked as Defendants' Exhibit "J-3." Thereupon receipts in full were passed between Frank Waterhouse & Company and the North Alaska Steamship Company, each releasing the other from any further claims. I should have stated that in this arrangement with Mr. McKee it was stipulated that Frank Waterhouse & Company should not assert

(Testimony of W. H. Bogle.)

any claims to the freights that were payable at Nome on the cargo carried up on the "Garonne," those being the freights that had been transferred by Mr. Smith to Mr. Pusey. I have here a copy of the release executed by Frank Waterhouse & Company to the North Alaska Steamship Company. The release executed by the North Alaska Steamship Company to Frank Waterhouse & Company was in the same form as the copy now presented, except that it was executed by the North Alaska Steamship Company to Frank Waterhouse & Company, instead of by Frank Waterhouse & Company to them. I herewith hand the master a copy of the release referred to, and ask that it be marked as an exhibit to my deposition.

(Document produced and presented by the witness is marked Defendants' Exhibit "Q-3.")

(Whereupon further proceedings are adjourned until 2 P. M.)

April 27, 1905, 2 P. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

Mr. BOGLE.—During the time of these negotiations in New York Mr. Waterhouse requested his office in Seattle to wire him what amount of outstanding bills against the North Alaska Steamship

(Testimony of W. H. Bogle.)

Company for material, supplies, labor, etc., had been up to that date turned into the office, and which remained unpaid. He received a telegram from his office under date of July 7 furnishing that information and which is Complainant's Exhibit No. 11 in this case.

Immediately after the North Alaska Steamship Company abandoned their contract, and sometime during the same day, Mr. Waterhouse and I obtained a conference with Mr. W. F. King, of Calhoun, Robbins & Company, and Mr. Waterhouse made complaints to Mr. King to the effect that he felt he had been badly treated by these New York parties, Mr. King and his associates, in this transaction. He stated to him that he had been assured from the time of the original contract of sale that they would carry out the contract and make their payments and would take care of whatever debts were incurred against the ship, and that even so late as the time of Mr. Mead's visit to Seattle, he had been assured by Mr. Mead that if he would come back to New York with him the matter would still be carried out, and that during all these negotiations that had been held, covering that length of time (he had been detained there something like eight or ten days), the same expectation had been held out, and that all at once Mr. King and his people had announced that they

(Testimony of W. H. Bogle.)

would hold on to their mining proposition and go ahead with that and drop the steamship matter, which left Mr. Waterhouse with the ship on his hands and bills that were due, and immediately payable amounting to over $30,000; and that while he did not charge that Mr. King personally had been responsible for the default which had been made by the North Alaska Steamship Company and the Occidental Securities Company, that he did feel that those people, being Mr. King's associates, and that Mr. King himself, having protracted these negotiations in New York over so many days, Mr. King was under some obligation to assist Mr. Waterhouse in taking care of this very large indebtedness which existed against the ship, which was estimated by him at that time to be approximately $35,000. Mr. King claimed that he had been misled by these New York people—

Mr. KING.—You are testifying to what conversations took place in your presence?

Mr. BOGLE.—(Continuing.) Yes; the three of us there together. He claimed that they had secured some $30,000 out of him by misrepresenting the situation.

Mr. KING.—We move to strike out that answer as not competent and not in any way affecting the issues in this case; as to any controversy between

(Testimony of W. H. Bogle.)

Mr. King and his associates and as to the dealings between them.

Mr. BOGLE.—(Continuing.) But he stated at the same time that he felt himself that he owed something to Mr. Waterhouse, and if there was any practicable way that he could be of any assistance to him in taking care of this heavy indebtedness that was thrown back on him, if Waterhouse would suggest it that he would entertain it and see what he could do.

Mr. KING.—I object to that as irrelevant, immaterial and incompetent.

Mr. BOGLE.—(Continuing.) And he asked Mr. Waterhouse what suggestion he had to make along that line. Mr. Waterhouse said to him that the balance due on the purchase price was a little over $37,000—I think exactly $37,541—that if he had $30,000 immediately available, it would enable him to take care of these outstanding bills against the "Garonne," and whatever additional amount the bills amounted to he could take care of himself, and he proposed to Mr. King that if he, King, would put in $30,000, that he, Waterhouse, would contribute the $37,000 that was due to him, making the total of $67,000, and that they would own the steamer in that proportion, and that he would use the $30,000 contributed by King in relieving the steamer of any

(Testimony of W. H. Bogle.)

liens or encumbrances. He stated that he made this proposition because of the stress in which he found himself; that these debts of thirty odd thousand existing against the ship were liens and immediately payable, and that he was not in a financial condition himself to raise that amount of money to pay them. Mr. King said that he would think the matter over and talk with some of his friends or associates about it, and would give Mr. Waterhouse an answer later in the afternoon. During that afternoon he came to Mr. Waterhouse and said that he had considered the matter, and that under the circumstances he would accept that proposition with this qualification; that he would want an equal voice in the management of the corporation, and that he would suggest that their plan could be carried out by organizing a new corporation, fixing his capital stock at some nominal sum, one-half of which would be held by Mr. King and one-half by Mr. Waterhouse, and that they would convey this vessel to that corporation, and that corporation would assume the indebtedness to Waterhouse of $37,000 and to King of $30,000, and put it in the shape of notes or obligations of the company, so that in that way Waterhouse would get $37,000 out of the earnings of the company while King was getting $30,000, and after that their interest would be equal. Mr. Waterhouse accepted

(Testimony of W. H. Bogle.)

that proposition, and it was then reduced to writing and signed by the two of them. That agreement is dated July 9, and was executed in the office of Griggs, Baldwin & Baldwin in New York by Mr. King and Mr. Waterhouse in my presence on that day; a copy of which has been filed herein and marked Complainant's Exhibit No. "21."

Mr. KING.—I move to strike out all that part of the witness' testimony construing, or in any way explaining that agreement, as the agreement is sufficiently specific to explain itself and needs no construction, and it is the best evidence of what it contains.

Mr. BOGLE.—(Continuing.) Mr. Waterhouse and I left New York, either on the night of the day that agreement was executed or on the following day, and returned direct to Seattle.

The Merchants' & Miners' Steamship Company was subsequently organized by Mr. King in New York, pursuant to that agreement. That company, after it was organized, did execute notes to Mr. King aggregating $30,000 and to Mr. Waterhouse aggregating $37,000, but no mortgage was ever executed, so far as I know or have any reason to believe. Those notes were three notes payable to Mr. King for $10,000 each, one due November 15, 1904, one due June 5, 1905 and one due November 15, 1905;

(Testimony of W. H. Bogle.)

and three notes payable to Frank Waterhouse & Company, one for $12,000 due November 15, 1904, one for $13,000 due June 5, 1905 and the other for $12,000 due November 15, 1905. No payment was ever made on either of these notes. After the organization of the Merchants' & Miners' Steamship Company was completed in New York, a bill of sale was executed by Frank Waterhouse & Company conveying the steamship "Garonne" to that company, which bill of sale is of record as an exhibit in this case; the capital stock named in the Merchants' & Miners' Steamship Company was never issued nor subscribed for further than as appears by the agreement between Mr. Waterhouse and Mr. King heretofore referred to.

In addition to the liabilities that existed against the North Alaska Steamship Company and which were liens against the "Garonne," mentioned in the telegram to Mr. Waterhouse under date of July 7th, 1904, I would state that some time in September or August—August or September, 1904, a suit was brought in the United States District Court at Nome, Alaska, by one C. J. Jorgenson, libelant, against the steamship "Garonne" and the North Alaska Steamship Company, claiming a balance due the libelant from the North Alaska Steamship Company of $3,625.02, which was claimed to be a lien against

(Testimony of W. H. Bogle.)

the "Garonne." That suit is still pending in the court at Nome, Alaska. I am not able to state, of course, for what amount the ship is liable in the case. That liability, however, whatever it was, was not included in the list of debts heretofore filed in this case and which have been referred to in the telegram above mentioned.

In April, 1905, the Merchants' & Miners' Steamship Company transferred and conveyed the steamship "Garonne" to the White Star Steamship Company and received in payment therefor $90,000 par value, of the stock of this latter company. That stock was divided between Frank Waterhouse & Company and Mr. King's successor in interest, to wit, the Mead Development Company. Frank Waterhouse & Company receiving $48,500 of the stock and the Mead Development Company $41,500. Soon after the White Star Steamship Company acquired the boat, they chartered the steamer to one S. A. Sorebernick for one or more voyages carrying refugees from Shanghai to Odessa. The vessel made the trip and arrived in the Black Sea about July 10, 1905, and, owing to the disturbance at Odessa, she proceeded to Theodosa and discharged the refugees there. The charterer, although obligated to redeliver the ship at Seattle, abandoned the charter in the latter part of July, or early in August, 1905, while the

(Testimony of W. H. Bogle.)

vessel was at Theodosa in the Black Sea. The owner, after endeavoring to find some other employment for the vessel, subsequently sold her to some parties in Genoa, Italy, at about $40,000. This vessel was purchased by Frank Waterhouse & Company, Limited, in London, about 1896 or '97 for $50,000.

Mr. KING.—I move to strike out that last statemen as irrelevant, immaterial and incompetent.

Mr. BOGLE.—I think that covers everything that I know about this case.

Cross-examination.

Q. (Mr. KING.) You say in January, 1904, you were secretary of Frank Waterhouse & Company?

A. I was.

Q. And continued as secretary since?

A. I have.

Q. And are still secretary?

A. I think so.

Q. Why do you say "I think so," Mr. Bogle; don't you know?

A. The meetings of the stockholders and board of trustees of that company have been very irregular, inasmuch as the stock is held in very few hands. I say "I think I am still secretary" because I have never been notified of any election of a successor.

(Testimony of W. H. Bogle.)

Q. As far as you know you are still secretary?

A. Yes.

Q. During that time you were also a stockholder?

A. No, sir, I never have been a stockholder, except to hold one share for qualification.

Q. During all this time you have represented Mr. Waterhouse as his attorney, and that company as its attorney? A. Yes, sir.

Q. You have spoken in your direct examination of a receipt which was executed to Ferguson on the first payment on the "Garonne"; that first payment was $1,000, wasn't it? A. Yes.

Q. And do you know that General Dodge ever saw that receipt or any of the conditions it contained? A. I do not.

Q. Do you know where that receipt is now?

A. I think I saw a copy of it in these exhibits (referring to documents). I will answer that I do not know where the original receipt is. When the second payment of $14,000 was made on February 15, there was a similar receipt executed for that money, except that it ran to C. B. Smith, while my impression is that the first one ran to W. E. Ferguson. I find a copy of that second receipt is filed here as Defendants' Exhibit "B-3" to Frank Waterhouse's deposition in this case. My recollection is that I drew both receipts and they were in practi-

(Testimony of W. H. Bogle.)

cally the same terms, except as to the amount and and except as stated above that I think the first one ran to W. H. Ferguson, although I am not sure of that.

Q. Who was Ferguson, Mr. Bogle?

A. I do not know. I never heard of him prior to this transaction.

Q. Wasn't he a ship broker?

A. I do not think so, although I do not know positively.

Q. Wasn't he employed by Frank Waterhouse & Company to obtain a purchaser for the "Garonne"?

A. I never understood that he was

Q. Wasn't he to get a commission on the sale to the North Alaska Steamship Company people?

A. I have no personal knowledge of that, but I do have an impression that I was so told at the time, but my understanding was that he came to Frank Waterhouse with the purchaser without disclosing names and said it was New York parties, and the deal was negotiated on that line, and at that time, or some subsequent time, Mr. Waterhouse agreed to pay him a commission if the sale was effected.

Q. Do you know whether or not he has been paid the commission?

A. I do not. I have no personal knowledge of any of the payments or of any of the disbursements in this case.

(Testimony of W. H. Bogle.)

Q. Was he at any time employed by Waterhouse during those negotiations in any other capacity?

A. Nothing that I ever heard of.

Q. Were you present with Pusey and Smith and Waterhouse when the statement was made as to the $14,000 worth of indebtedness against the "Garonne," on or about June first or second?

A. Yes, I was present when that statement was made, but I am not sure whether it was at the meeting when Mr. Smith was present or at the meeting when Mr. Pusey and Mr. Waterhouse were present, when Smith was absent.

Q. Was Pusey present at the meeting, whether Smith was there or not?

A. Pusey was present at the time this fourteen or fifteen thousand dollar estimate was made by some computation of the various accounts which had been either received at Mr. Waterhouse's office or received and reported by Mr. Hastings from the North Alaska Steamship Company office direct, or which were known by some of the parties to be outstanding, although not reported. It was not understood to be an accurate statement, but it was the closest estimate that they could make.

Q. It was made by Mr. Waterhouse, was it, from data in his office then?

(Testimony of W. H. Bogle.)

A. My recollection is the statement was made by Mr. Waterhouse as a thing which had been discussed by him and Mr. Pusey and accounts gone over before I arrived there. At any rate, I took it as an accepted fact that it was the best information they both had.

Q. And at that meeting it was understood by those present that that was practically the entire indebtedness against the ship outside of what was due on the purchase price to Waterhouse & Company?

A. It was thought it would not exceed $15,000; that was on the first day that we had our meeting. On the next day other bills came in which would indicate it would run higher.

Q. It was thought, however, that the receipts from the passenger money would pay those bills or go a large way towards paying them?

A. Yes.

Q. Who received that passenger money?

A. I cannot state of my own personal knowledge; I can only give you what I understood at the time.

Q. Did you understand that Waterhouse & Company—that they passed through Waterhouse & Company's hands?

A. I understood that some of the freight bills were paid direct into Waterhouse & Company's office, some of them were paid direct into the North

(Testimony of W. H. Bogle.)

Alaska Steamship Company's office in charge of Captain Hastings, some of them were paid I think at the dock where the freight was delivered, and some of the passenger money was paid into Captain Caine's office; who was acting as agent for securing passengers for the ship.

Q. But this money eventually all came to Waterhouse, didn't it? A. I think so.

Q. And Waterhouse & Company were agents for the ship and Caine, if an agent at all, was a subagent under Waterhouse.

A. Waterhouse was agent for the ship and was to receive, as I understood, a commission upon the gross passenger and freight receipts. Caine, as I understood, was appointed by either Ferguson or Hastings, but I may be in error about that; in fact I do not think I ever knew who had made his appointment. Mr. Waterhouse insisted that all receipts should come to his office, because he claimed the ship belonged to him and he was vitally interested in seeing that the debts against her were paid, as far as those receipts would pay them.

Q. There was also an agreement or understanding, was there not, that no bills should be incurred without Waterhouse's sanction?

A. I do not think there was any agreement to that extent. My understanding was that early in

(Testimony of W. H. Bogle.)

the negotiations or in the proceedings, say in February or March and possibly in April, that Waterhouse permitted the North Alaska Steamship Company, through its representatives, to take only a qualified possession of the ship; that is, he had Captain Jordison as his own agent in charge of the ship, but those other people were permitted to send their representatives on board and make some changes and alterations which they thought were desirable, with the understanding that all such expenses would be paid for by the North Alaska Steamship Company immediately, and no debts would be incurred against the ship. It was sometime after the original contract before I ever heard of any debts being incurred against the ship, and from that time on Mr. Waterhouse was very diligent in endeavoring to get them paid up.

Q. You know, don't you, Mr. Bogle, that Mr. Waterhouse insisted on an agreement that no indebedness should be incurred against the ship without his permission?

A. I cannot say that I know of such an agreement, because I never heard that agreement entered into between him and those people. I can say this; that I was told by him at the time that he would not permit them to incur any indebtedness against the ship without they provided a fund at the time to

(Testimony of W. H. Bogle.)

pay it and, of course, he would have to have knowledge of it in order to carry out that kind of an arrangement; but that is what he told me and it was in accordance with the advice I gave him.

Q. Do you know of any freight money being received after the ship arrived at Nome?

A. No, I do not. I do not know anything about it at all; I was not at Nome and I do not know.

Q. I mean, received here by Waterhouse & Company?

A. No. My understanding has always been there was none. The report that was made in New York, or possibly I got that information after I returned to Seattle; at any rate after the ship returned here, was that these freight moneys had been collected by Mr. Smith and used in connection with those various enterprises up there—the Desota Mining Company is one of them, and some other company that they called the Rowe Mining Company, I think it was, but that is mere hearsay, I do not know of my own knowledge. I might add, in order to give you every information that I have in regard to it; my recollection is that there was some amount, probably about $900, that was received by the ship on passenger money on the southbound voyage, which went into the hands of Waterhouse & Company after the ship returned down here; that was not freight money on the north-

(Testimony of W. H. Bogle.)

bound, but passenger money on the southbound voyage.

Q. When was that received, do you say?

A. Shortly after the ship returned from Nome; brought down by the purser, collected by him from passengers on the southbound trip.

Q. What was done with that money, do you know?

A. It was turned into the office of Waterhouse & Company, as far as I know.

Q. Was it applied against the indebtedness on the ship, do you know?

A. I have no personal knowledge. The account which you have from Mr. Townsend shows what the amount was and how it was paid. I have no personal knowledge of it.

Q. The instructions which you state in your direct examination were given to the Chase National Bank when the bill of sale and mortgage were sent to the bank, were in writing I presume?

A. Yes.

Q. You have not got a copy of them?

A. Yes; a copy of the letter accompanying the papers is made an exhibit to the deposition of Mr. Waterhouse.

(Testimony of W. H. Bogle.)

Q. You said that S. C. Mead came to Seattle about the middle of June representing the New York parties; did he state whom he represented?

A. He said that he represented the parties interested in the North Alaska Steamship Company and Occidental Securities Company.

Q. Did he state that he represented General Dodge?

A. No, I do not think he referred to General Dodge.

Q. At this time, or about this time, you testified that it was ascertained that the bills against the ship were much larger than they were supposed to be when Mr. Pusey was here? A. Yes.

A. Yes.

Q. Do you know whether Mr. Pusey or General Dodge ever had any information as to that excess of bills? A. Up to what time?

Q. Up to the time that Mr. Mead came to Seattle.

A. I have no information on that subject at all. My information was that Mr. Pusey went from Seattle south, and from there to Texas, and did not return to New York until after Mr. Waterhouse and I had left New York and came back to Seattle.

Q. As far as you know, neither Pusey or Dodge had any knowledge of that increase of indebtedness.

(Testimony of W. H. Bogle.)

A. At that time, no.

Q. Nor until you left New York?

A. Not so far as I know. The New York people all knew it, and whether they communicated it to General Dodge or not, I do not know.

Q. At the meeting in the office of the Merchants' Association of New York in the early part of July, do you know of your own knowledge whether or not General Dodge or anyone representing him was present?

A. If General Dodge was present I think I would have known it. I do not think, and I feel quite sure he was not present, although I did not know General Dodge. If anybody especially represented him I had no knowledge of it. There were quite a number of people there whose relations to the company were unknown to me.

Q. Whereabouts is the Merchants' Association, whereabouts in New York?

A. It is in the New York Life building on Broadway, but I am not able to give you the number, I do not know.

Q. About how far up on Broadway, do you know?

A. No, I could not tell you that.

Q. And it was at this meeting that Mead made his report as to what he had ascertained in Seattle

(Testimony of W. H. Bogle.)

as to the debts against the ship and matters generally out here.

A. Yes, at the first meeting he made that report.

Q. Was that a written report or verbal report?

A. My recollection is that he had a lot of data in the shape of accounts and statements and figures, but he did not read the report, but he used that data in making his verbal report. I do not know whether he ever made a written report or not. This was not a company meeting, but a meeting of all parties, creditors of the company and stockholders and Mr. Waterhouse and myself.

Q. Complainant's Exhibit No. 9 is an account of the debts; debits and credits against the steamship "Garonne," which was afterwards paid by Frank Waterhouse & Company, or at least by the money furnished by Mr. King (showing); is that the debt which you mean when you speak of those debts which were liens against the ship?

A. Yes. Your question, so far as it states the method of payment, is inaccurate. Mr. King's $30,000 was paid into the Merchants' & Miners' Steamship Company.

Q. Well, there is no contention but what Mr. King's $30,000 was applied in payment of this indebtedness, is there?

(Testimony of W. H. Bogle.)

A. None whatever as to the use that was made of it.

Q. So that is what you mean when you speak of liens? A. Yes.

Q. You do not contend that all these were maritime liens against the ship, do you, although they may have been money due Waterhouse & Company?

A. It was not the intention to pay any debt that was not a lien against the ship; I mean to pay any debt which had been incurred by the North Alaska Steamship Company. This company was not in any way assuming any of the debts of that company, but it was paying such debts as were liens against the steamship "Garonne," and I do not know of any claim that was paid that was not a lien against the ship.

Q. Do you consider that the payment of $2,036.07, as 5% commission to Frank Waterhouse & Company on the "Garonne's" first voyage was a lien against the ship?

A. Well, I do not know whether an agent's commission on the freight money would be a lien or not.

Q. Now, about the payment of 2½% disbursement commission, amounting to $897.27?

A. I think that would be regarded as a debt against the ship; whether it would be strictly a maritime lien or not, I am not prepared to say.

(Testimony of W. H. Bogle.)

Q. You say that you inquired, at this meeting, as to whether General Dodge could be reached. Of whom did you inquire, Mr. Bogle?

A. Mr. Corwine. That is, my recollection now is that it was Mr. Corwine that I spoke to about it; it is possible it may have been Mr. King and that he referred the matter to Mr. Corwine; at any rate the report came from Mr. Corwine the next morning.

Q. You made no other efforts to find General Dodge beyond those inquiries which you made?

A. No, I had no reason to. I want to state, however, that in the course of these negotiations and conference, it was understood by all parties there just what the condition of General Dodge's matters was; that he had a claim—he had a debt which he claimed was a debt of that company and that he had taken an assignment of those freight bills up North, and that he had this agreement that this company would execute a second mortgage to secure it, which was not done.

Q. That statement was made by you to them, wasn't it?

A. I do not know; I do not recall whether it was made by me or by Mr. Waterhouse or by some of the other parties; it was one of the facts of the situation which was understood by all the parties, and the statement was made by somebody, probably by me,

(Testimony of W. H. Bogle.)

although I do not now recall it. The status of a great many other creditors was mentioned at the same time by the parties who were familiar with it.

Q. At the meetings of the 7th and 8th of July in the Merchants' Association's office, was General Dodge or anyone representing him, present at any one of those meetings?

A. No. General Dodge, as far as I know, was never present or represented specially at any of those meetings?

Q. Do you know when the North Alaska Steamship Company served the notice of forfeiture on you; do you know whether General Dodge had any notice or knowledge of that? A. I do not know.

Q. As far as you know he did not?

A. Well, I do not know anything about it.

Q. During those meetings in the early part of July, at some one of them, you had an interview with Mr. McKee of McKee & Frost? A. Yes.

Q. In which they claimed that they had a lien against the ship for part of the purchase price that was already paid?

A. No. Mr. McKee never made that claim.

Q. He threatened litigation, didn't he?

A. Yes—

Q. And in order to avoid litigation—

(Testimony of W. H. Bogle.)

A. —let me explain a little further about Mr. McKee's attitude. The letter which he served set up such a claim and threatened litigation. Mr. McKee himself, when I discussed it with him, took a much more conciliatory attitude, and said they did not want any litigation, and while he did not, in express terms, admit that they had no claim against the ship for those moneys, he intimated or conveyed the impression to me that they had not any.

Q. Then you and Mr. McKay came to an agreement by which he would abandon any claim that he had, or thought he might have, to this purchase money, and you would release the North Alaska Steamship Company from any personal liability regarding this indebtedness.

A. No.

Q. And both gave receipts in full.

A. (Continuing.) The agreement we reached was that they would give a full release and waiver, or abandonment, or whatever it might be called, as to any rights under their contract of purchase, and and that Waterhouse would give a similar receipt or release and waiver of any claim against them for the balance of the purchase money, and that Waterhouse, in taking back his ship and waiving his claim against them, would take care of such of the material and lien debts created by the North Alaska Steamship

(Testimony of W. H. Bogle.)

Company at Seattle, as were liens against the ship, and would not assert any claim to the unpaid freight bills which had been collected by the North Alaska Steamship Company at Nome, being the claims which had been transferred to General Dodge.

Q. It really was a settlement between Waterhouse and the North Alaska Steamship Company, and after you got through you each quitclaimed one to the other.

A. We each executed a waiver or release of any claims one against the other; it was a settlement to that extent; we paid them nothing and they paid us nothing, and they abandoned all their rights under this option or contract to purchase the ship.

Q. That was done prior to any negotiations with Mr. King as to the advance of the $30,000.

A. Yes, sir.

Q. Did Mr. King make that a condition precedent to his advancing any money? A. Make what?

Q. That the North Alaska Steamship Company should release the ship?

A. No. At the time we made this arrangement with Mr. King, Mr. McKee and I had already reached a settlement. I am not sure whether the papers had actually passed at that time or not, but it was all done.

Q. But King knew of this release then?

(Testimony of W. H. Bogle.)

A. Yes; he was present when Mr. Kee handed me the letter which I have referred to.

Q. How long after that was the interview with Mr. King and Mr. Waterhouse in which Mr. Waterhouse complained of being badly used?

A. It was very shortly afterwards.

Q. On the same day?

A. The same day, and my recollection is it was the same forenoon. When we had separated on the day before it was under consideration, the proposition of raising the money to pay off these debts and letting Mr. Waterhouse extend his debts to six, twelve and eighteen months, as he had offered to do as a final resort and we were under the impression that they were going to accept that proposition, but they came into the meeting the next morning and announced that they would not raise any more money for it whatever, and then, immediately accompanying that announcement Mr. McKee served this notice on me that I referred to.

Q. How long after that was the Merchants' & Miners' Steamship Company incorporated?

A. I cannot give you the exact date, because I have not the articles of incorporation. That was incorporated in New York after Mr. Waterhouse and I returned to Seattle.

Q. But shortly after?

(Testimony of W. H. Bogle.)

A. Shortly after, and pursuant to this agreement.

Q. The capital stock of that company was placed at $100,000? A. Yes.

Q. You say it was never issued?

A. Never issued.

Q. Nor subscribed?

A. Nor subscribed any further than you will find in that agreement that I have referred to by Mr. King and Waterhouse; it was to be divided between them.

Q. Do you know of any assets that the Merchants' & Miners' Steamship Company had, except the "Garonne"?

A. None whatever. It had not either subscription contracts or assets of any other kind except that steamer.

Q. You stated that in addition to the debts that were mentioned in the telegram from Seattle at the time of these meetings in New York, there was a suit by Jorgenson then pending against the ship in Alaska.

A. No; I stated that the Jorgenson suit was brought against the ship during the latter part of August or the first of September following.

Q. Was not the Jorgenson claim known at the time of the settlement in New York?

(Testimony of W. H. Bogle.)

A. No, it had not been heard of.

Q. Is this the same Jorgenson who has testified in this case?

A. No; this man is C. J. Jorgenson.

Q. And the man who testified in this case was?

A. Jordison.

Q. They are two different people then?

A. Altogether different.

Q. And this Jorgenson who brought the suit was not in the employ of Waterhouse & Company at any time?

A. Never; he was a lighterage man at Nome.

Q. What was the claim for?

A. Captain Ferguson, on behalf of the North Alaska Steamship Company during the spring of 1904 had entered into a contract with Jorgenson employing him to do the lighterage for the "Garonne" at Nome for that year, and my recollection is, for a total period of three years, and he had also agreed to carry up certain lighters and boats and lumber for Jorgenson. This claim of Jorgenson was for a balance of the lighterage done for the "Garonne" on this voyage to Nome, and also a claim for damages for the failure to carry up those lighters and for failure to carry up some of the lumber which Ferguson had agreed to carry up.

(Testimony of W. H. Bogle.)

Q. Had this claim of Jorgenson anything to do with the claim of P. B. McLeod which you afterwards settled?

A. No. I might state that there was a claim of McLeod which had been filed and which was subsequently settled, and this claim of Jorgenson which is still pending, and we also had a suit by a man named Johnson seeking to enforce a claim against the ship which has been tried and a decision in favor of the ship, so that there was no liability in that case except the expenses attending the suit.

Q. What was the White Star Steamship Company capitalized for?

A. Three hundred and fifty thousand dollars. I might state that the White Star Steamship Company had been in existence several years prior to April, 1905, and its capital stock had been $75,000. In April, 1905, Mr. Waterhouse, representing the Merchants' & Miners' Steamship Company, and Mr. Mark Reed, who was the manager of the White Star Steamship Company as it then existed, agreed on a merger or combination of the companies, and in connection therewith they were to buy the steamship "Ohio." The properties that were owned by the White Star Steamship Company at that time were put in at a valuation, and the capital stock of the company was increased from $75,000 to $350,000.

(Testimony of W. H. Bogle.)

The old stockholders received new stock for the valuation of the property they put in, and the Merchants' & Miners' Steamship Company received stock for the "Garonne" which they put in, and the Arlington Dock Company received stock for the dock leases which they put into the company, and the new company purchased the "Ohio."

Q. Then the capital stock of the White Star Steamship Company was practically paid up?

A. Yes, there was $325,000 of it was paid up.

Q. Was not the ship appraised prior to her being put into the White Star Steamship Company?

A. No.

Q. Wasn't she valued or appraised by this man Fowler and another man?

A. Not for any purpose connected with that deal, so far as I ever heard.

Q. Wasn't she appraised?

A. I don't know whether she was or not; she may have been at some time, but she was not in connection with that deal.

Q. Then you do not know whether or not she was appraised after she became the property of the Merchants' & Miners' Steamship Company?

A. No, I do not. I do not know of any purpose for which she would have been appraised, unless it

(Testimony of W. H. Bogle.)

may have been some matter in connection with insurance.

Q. You do not know the purpose for which she was appraised by Fowler and Wiley, in March, 1905?

A. I do not.

Q. Was that prior or subsequent to her sale to the White Star Steamship Company?

A. What is the date?

Q. The date is not given any closer than that.

A. If it was in March it was prior to the consolidation with the White Star Steamship Company; my recollection is that that combination went into effect about the 13th or 14th of April.

Q. The only date given is March, 1905.

A. That was prior to the consolidation.

Q. Do you know whether or not she was valued in the charter party to Serebrenick?

A. She was not.

Q. Was she insured for the benefit of the owners during that charter party?

A. I understood she was.

Q. Do you know to what amount?

A. I do not. I could find out from the statement, but I cannot quote it from memory; my recollection is that you have that statement in your papers.

Q. Who was this man Serebrenick?

(Testimony of W. H. Bogle.)

A. I do not know anything about him, except that he, acting through some San Francisco brokers, chartered this ship.

Q. Are you acquainted with the difference in value, if any, of ships in London and on this coast?

A. I am not.

Q. You do not know as a fact that they fetch a much better price here than they do there?

A. I think it would depend on the character of the ship, the size and tonnage.

Q. Do you know anything about the condition of the ship prior to her sailing for Nome on that voyage of June 2d, 1904?

A. Nothing of my own knowledge; she was understood to be in good condition.

Q. I think that is all.

Mr. BOGLE.—(Continuing.) I might state in that connection that the "Garonne" was a ship that has required a great many repairs every year. She was an expensive ship to maintain and an expensive coal-burner and with a very small cargo carrying capacity compared with her registered tonnage, and not well adapted to any business on the Pacific Coast.

(Testimony of witness closed.)

Here defendants rest.

May 6th, 1906, 10 o'clock A. M.

The testimony in behalf of defendants being closed, solicitor for complainant makes the following offers of testimony in rebuttal:

Mr. KING.—Complainant now offers in evidence in rebuttal certified copy of the certificate of incorporation of the Merchants' and Miners' Steamship Company of New York.

Mr. BOGLE.—Defendants object to the introduction of the same in evidence on the ground that the same is irrelevant, immaterial and incompetent.

(Document received in evidence and marked "Complainant's Exhibit No. 25.")

Mr. KING.—Complainant now offers in evidence in rebuttal certified copy of the certificate in payment of entire stock of the Merchants' and Miners' Steamship Company of New York.

Mr. BOGLE.—Defendants object to the introduction of the same in evidence on the ground that the same is irrelevant, immaterial and incompetent.

(Document received in evidence and marked "Complainant's Exhibit No. 26.")

Whereupon all parties rest and the testimony is closed.

I hereby certify that the foregoing depositions of said witnesses were taken by said Master and by said Special Examiner, and reduced to writing and

are herewith returned, and the foregoing are such depositions and the whole thereof; that the reading and signing of the depositions of each and all of said witnesses by said witnesses were, by the witnesses themselves and the solicitors for the respective parties, waived.

That the exhibits herewith returned and duly marked, were during the taking of said depositions, as appears in said record, offered in evidence by the respective solicitors for the parties, and are certified and marked as such exhibits.

That the taking of said depositions was adjourned from time to time to suit the convenience of the parties and solicitors, and occupied six days; that the compensation of said Master and said Examiner is as follows: $209.50; and said depositions as said exhibits, so as aforesaid mentioned, are all of the proofs and testimony taken in said cause, and the same are herewith returned.

All of which is respectfully certified.

N. W. BOLSTER,
Special Examiner.

[Endorsed]: Testimony. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 8.

Register No. 54	Official Number,	
	Numerals	Letters.
Permanent.	86504	KPTW

COPY OF CERTIFICATE OF REGISTRY.

In pursuance of chapter one, title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States.

Frank Waterhouse, of Seattle, Washington, President, having taken and subscribed the oath required by law, and having sworn that the Merchants and Miners Steamship Company, of New York, a corporation organized under the laws of the State of New York, as the only owner of the vessel called the Garonne of New York whereof John Gordeson is at present master, and is a citizen of the United States; and that the said vessel was built in the year 1871, at Glasgow, Scotland, as appears by P. R. #108, issued at Port Townsend, Wash., May 4, 01; surrendered, O. & Dist. Changed; and said Register having certified that the said vessel has four decks and three masts, and that her length is 371 and 0 tenths feet, her breadth 41 feet and 4 tenths, her depth 20 feet and 4 tenths, her height feet and tenths; that she meas-

ures Twenthy-three hundred nineteen tons and hundredths, viz:

	Tons	100ths.
Capacity under tonnage deck	1938	19
Capacity between decks above tonnage deck	1962	93
Capacity of inclosures on the upper deck, viz:	44	54
Gross Tonnage	3945	

Deductions under Section 4153, Revised Statutes, as amended by Act of March 2, 1895:

Crew space, 233,79; Master's cabin	233.79
Steering gear; Anchor gear, 46.62; Boatswain's stores, 71.12	117.74
Chart-house; Donkey engine and boiler; Storage of sails 12.03; Propelling power 1262.61	1274.64
Total Deductions	1626.17
Net Tonnage	2319.

The following—Described spaces, and no others, have been omitted, viz:

and that she is a Screw Steamer (iron), has a figure head and an elliptic stern; and the said having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at the Port of Port Townsend, Washington.

Given under my hand and seal, at the Port of Port Townsend, this 6th day of August, in the year one thousand nine hundred and four.

Place for seal of Naval Officer. No. Place for seal Naval Officer. of Collector.

CHAS MILLER,
Deputy Collector of Customs.

[Seal of the United States Treasury.]

E. T. CHAMBERLAIN,
Commissioner of Navigation.

[Endorsed also]: Deft. F. Waterhouse, Exhibit 8. Filed before Eben Smith, Master In Chancery, United States, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore Dep.

Complainant's Exhibit No. 9.

INDEBTEDNESS NORTH ALASKA STEAMSHIP CO.

Statement from Seattle books of the Merchants & Miners S. S. Co.

1904

July 19, Commercial St. Boiler Works.... .... 1,485.27
Frye Bruhn Co., Inc... 2,689.78
Gorham Rubber Co.... 52.70
S. Hyde 48.50

	Johnson & Higgins....	325.00
	Kilbourne & Clark Co..	819.09
	King & Winge, balance	1,725.60
	McCabe & Hamilton, Inc.	980.27
	South Prairie Coal Co.	503.70
	Star Publishing Co....	28.09
	Times Printing Co.....	57.20
	Foster & Kleiser.....	16.00
20,	Frank Waterhouse & Co. Inc. 5% commission on "Garonne" Voy. 1 earnings.....	2,036.07
21,	Frank Waterhouse & Co. Inc., balance 2½% disbursing commission	597.27
22,	Western Union Tel. Co.	64.66
	Pacific Tribune Pub. Co.	50.00
	Daily Gazette	12.50
	The Guide	6.50
	City Dye Works.....	4.00
	Post Intelligencer Co...	49.12
	Globe Wall Paper Co...	1.00
	Frank Waterhouse &	

	Co. Inc., Insurance Feb. 14th to May 30th	382.83
	March telegrams	12.17
	Montana Stables	2.00
	MacDougall & Southwick Co.	584.31
	Sunde & Erland Co	429.83
23,	J. R. Mason, Harbor policy	164.08
23,	J. R. Mason, Harbor policy	54.69
	J. R. Mason, London policies	4,471.09
25,	M. Seller & Co	387.50
27,	E. E. Caine, commission	892.25
29,	J. Sullivan, wages in May	2.50
	J. Still, wages in May	4.00
Aug. 1,	O. A. Johansen, Master, July 1st, 16th	128.17
4,	Lewis, Foard, Anderson & Co.	161.50
	Pacific Coast Co	4,271.45
9,	Paid Arlington Dock Co., McDowells deposit to apply on Ry.	

	freight on cargo for "Garonne"	30.00	
Sept. 2,	Seattle Hardware Co..	1,788.83	
	Standard Furniture Co.	451.15	
Oct. 5,	Schwabacher Bros. & Co.	2,874.13	
Nov. 18,	O. A. Johansen, Master, July 17 to Aug. 1.	90.67	
Dec. 19,	W. M. Johnson.....	127.00	
Jan. 31, 1905,	P. B. McLeod...	300.00	
1904			
	Credit.		
Aug. 3,	Bowen & Co., for potatoes returned	31.63	
Oct. 5,	Part of purchase price of ss. "Garonne"....30,000.00		
1905			
Feb. 18.	Return premium London ins. policies while "Garonne" in harbor July 3d to August 23d	568.35	
		29,162.47	30,599.98
			29,162.47
	Credit balance,		1,437.51

[Endorsed]: Complainant's Exhibit 9. Filed in the U. S. Circuit Court, Western Dist. of Washing-

ton. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 10.

S. S. "Garonne"

4,000 Tons.

Sailing June 2d, 1904 at 7:30 P. M. Sharp.

For Nome, Solomon, Bluff City, Golovin Bay, connecting at Golovin Bay for White Mountain and Council City. Connecting at Nome for Tellar, York and Kotzebu Sound.

Through tickets and bills of lading to all Points.

Ticket Office, 608 First Ave.

Freight Office, 102 First Ave.

FRANK WATERHOUSE & CO., Inc., Agents.

[Endorsed]: Compl'ts. Exhibit 10. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 11.

Copy.

TELEGRAM

Seattle, Wash., July 7, 1904.

Frank Waterhouse, Holland House, New York City.

Unpaid North Alaska bills thirty three thousand five hundred exclusive disbursing commission. Cash sixty two hundred. Obligations including rod, machine work, payroll this and next week, twenty two hundred fifty.

FRANK WATERHOUSE.

[Endorsed]: Plffs. Exhibit 11. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiffs' Exhibit No. 12.

(On Letterhead of Frank Waterhouse and Co. Inc.)

Seattle, Wash., July 20th, 1904.

(Duplicate.)

North Alaska Steamship Co., to Frank Waterhouse & Co., Inc., Agents. Dr.

For 5% commission on $40,721.43 the earnings of The S. S. Garonne, Voyage 1, sailed from Seattle June 2d, 1904..... .....$ 2,036.07

Passenger earnings per manifest less rebates		23,496.50
Freight, per manifest	21,580.44	
Less proportion of river freight	4,024.48	
	17,555.96	
Less rebate to Alaska Gold Mining Co	331.03	17,224.93
		40,721.43

July 20th, 1904.

Received from the Merchants' and Miners' Steamship co., two thousand thirty-six and 07/100 in settlement of above commission.

FRANK WATERHOUSE & CO. INC.
By J. P. TOWNSEND, Treas.

[Endorsed]: Plff's. Exhibit 12. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906, A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiff's Exhibit No. 13.

(On Letterhead of Frank Waterhouse & Co. Inc.)

Seattle, Wash., July 21st, 1904.

Duplicate.

North Alaska Steamship Co., to Frank Waterhouse & Co., Inc. Dr.

For 2-1/2 % disbursing commission on	$32,578.13	$814.45
Disbursements as follows:		
Garonne repairs and port expenses	15,616.12	
Garonne voyage 1	15,557.62	
General expenses....	279.39	
Marine insurance	1,125.00	
	32,578.13	

Received July 21st, 1904, from Merchants' and Miners' Steamship Co., five hundred ninety-seven 27/100 dollars in settlement of the balance of above account (two hundred seventeen 18/100 dollars having been paid from funds of North Alaska Steamship Co.)

FRANK WATERHOUSE & CO. INC.
By J. P. TOWNSEND, Treas.

[Endorsed]: Plff's. Exhibit 13. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906, A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiff's Exhibit No. 14.

(On Billhead of Frank Waterhouse & Co. Inc.)

Duplicate.

Seattle, Wash. June 14, 1904.

North Alaska Steamship Company, to Frank Waterhouse & Co., Inc. Dr.

For proportion of insurance from February 14th, 1904, to May 30th, 1904, on Western policy #2672, issued November 30th, 1903, for $75,000 on S. S. "Garonne," Total premium November 30th to May 30th, $656.25, 3-1/2 months $382.83

Paid July 22, 04.

FRANK WATERHOUSE & CO., INC.

By J. P. TOWNSEND, Treas.

[Endorsed]: Plff's. Exhibit 14. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906, A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiff's Exhibit No. 15.

Duplicate.

$128.17.

Seattle, Washington, Aug. 1, 1904.

Received from the Merchants' & Miners' Steamship Company one hundred twenty-eight and 17/100

dollars, in settlement of services as Master of the S. S. "Garonne."

July 1st to 9th inc., 9 days at $250 per mo. 75.00
July 10th to 16th, inc., 7 days at $125 " 29.17
16 days board at $1.50 per day 24.00

O. A. JOHANSEN.

[Endorsed] Plff's. Exhibit 15. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western District of Washington, Jun. 16, 1906, A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiff's Exhibit No. 16.

Duplicate.

$30.00.

Seattle, Wash., Aug. 9, 1904.

Received from the Merchants' & Miners' Steamship Company, thirty dollars, to apply on the Railway freight on cargo shipped by John C. McDowell from Chambersburg, Pa., for the S. S. "Garonne" Voyage 2.

ARLINGTON DOCK CO.

[Endorsed]: Plff's. Exhibit 16. Eben Smith, Master in Chancery, United States, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Plaintiff's Exhibit No. 17.

Duplicate.

$90.67.

Seattle, Wash., Nov., 18, 1904.

Received from the Merchants' and Miners' Steamship Company, ninety 67/100 dollars, in settlement for services as Master of the S./S. "Garonne":

July 17 to Aug. 2, 1904, 16 days at $125 per mo. 66.67
16 days' board at $1.50 per day..... .....24.00

90.67

And I hereby acknowledge settlement in full and release the S/S "Garonne" from all claims.

O. A. JOHANSEN.

[Endorsed]: Plff's. Exhibit 17. Eben Smith, United States Master in Chancery, Western District of Washington,Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 19.

Cash Received from Chas. B. Smith and North Alaska Steamship Company, from February 3, 1904, to July 12, 1904, a/c "Garonne."

1904.

Feb. 3, Cash from New York 1,000.00
15, Cash from New York..... .....14,000.00

Mch. 15,	Cash from New York	7,000.00
18,	Cash from New York	3,000.00
Apr. 11,	10 days sight draft on C. B. Smith	5,000.00
May 10,	Cash from W. H. Ferguson, T. M..	1,000.00
13,	Cash paid F. Waterhouse in New York April 24th	5,000.00
18,	Cash from W. H. Ferguson, T. M.	560.00
23,	Cash from New York	2,500.00
26,	Cash from New York.....	5,000.00
27,	Cash from New York	10,000.00
31,	Cash from W. H. Ferguson, T. M.	690.00
June 1,	Cash from W. H. Ferguson, T. M.	1,195.00
1,	Cash from New York	5,000.00
2,	Cash from W. H. Ferguson, T. M.	6,137.55
2,	Cash from L. H. Gray & Co.....	2,650.50
3,	Cash from New York	1,060.00
3,	Cash from Arlington Dock Co....	5,248.49
3,	Cash from Chilberg & Fredericks..	570.00
6,	Cash from Alaska Pacific Nav. Co.	2,933.46
6,	Cash from Alaska Pacific Nav. Co.	1,091.54
6,	Cash from L. H. Gray & Co.....	50.00
6,	Cash from Arlington Dock Co....	399.37
9,	Cash John Jordison, balance from payrolls	49.49
9,	Cash Frank Waterhouse & Co. for Bonnell's tickets	150.00
25,	Cash Prepaid freight, J. C. McDowell	30.00

July	5, Cash W. H. Ferguson, T. M., remittance from Nome June 24 on sale passenger tickets south	900.00
	11, Cash 1 day on payroll returned....	2.00
	19, Returned from payroll by John Jordison	1.00
		82.218.40

Statement of the Disbursements of 82,218.40, funds received from Chas. B. Smith, and North Alaska Steamship Co., Account SS. "Garonne"

1904.

	Frank Waterhouse & Co., a/c purchase SS. "Garonne,"	48,600.00
Mar.	7, Labor and Material, February ..	982.13
Apr.	7, Labor and Material, March.....	1,098.90
May	5, Labor and Material, April	1,076.90
	6, Western Union Tel. Co., April ..	11.80
	9, Postal Tel. Co., April	39.14
	10, Customs, entrance from Victoria	75.24
	21, King & Winge, on a/c	800.00
	23, S. W. R. Dally	122.43
	31, W. H. Morris, a/c painting	622.10
	Victoria Dry Docking a/c.... ..	1,979.31
	Funds advanced Captain Jordison for payment laborers	4,856.00
June	1, J. M. Shawhan, Purser, a/c Port Payroll	756.25

2, J. M. Shawhan, Purser, a/c Port Payroll	181.00
2, John Hughes, Claim	75.00
6, S. S. "Garonne" Repairs & Port Expenses, D. C. Wilson	19.00
Diamond Ice & Storage Co	1.40
Henry Argens	93.10
City Dye Works	8.00
P. S. Dry Dock & Machine Co.	47.14
Tacoma Tug & Barge Co.	42.00
S. S. "Garonne" Voyage 1, Duwamish Dairy Co.	20.60
Cascase Laundry Co.	82.88
E. P. Burke	10.00
Max Kuner	115.60
Queen City Laundry	151.80
7, S. S. "Garonne" Voyage 1, C. H. Lilly & Co.	1,177.57
H. W. Moulton	467.10
Romans Photo Co.	18.40
Standard Oil Co.	235.24
Schwabacher Hardware Co.	66.34
Washington Fish Co.	149.02
Val. Schott.	20.00
G. Beninghausen.	2.50
Arlington Dock Co.	831.91
S. S. "Garonne" Repairs & Port Expense, A. F. Hutton	446.69

	Magnesia Asbestos Supply Co.	192.50
	Washington Mattress Co.. ..	176.85
	Walter Bowen & Co..	53.68
	Forward.... ....65,705.52	
1904	Brought forward	65,705.52
June	9, SS. "Garonne" Repairs & Port Expense C. M. Shaw & Co., on %	800.00
	J. Jordison, overseer, May.....	173.00
	Pilotage..	240.00
	SS. "Garonne" Voyage 1.....	
	Chesley Tow Boat Co.....	23.00
	Stevenson, Blekum Tug Co.....	150.00
	Seattle Office, W. B. Hastings, A. T. M.	300.00
	11, General Expense.....	
	Western Union Tel. Co.....	6.15
	Postal Tel. Cable Co.....	80.82
	13, Seattle Office, W. B. Hastings, A. T. M.....	20.00
	17, Marine Insurance....	
	Western Assurance #2775, $20,-000.....	600.00
	Maritime Ins., #1336, $17,500..	525.00
	18, SS. "Garonne" Repairs & Port Expense, King & Winge on %..	1,000.00
	21, SS. "Garonne" Repairs and Port Expense, Northwestern Improvement Co.....	425.49

	22, General Expense, Western Union Tel. Co., May.....	123.02
	24, Seattle Office, W. B. Hastings, A. T. M.	20.00
	SS. "Garonne" Voyage 1,.....	
	L. H. Gray & Co., 5% commission on freight	93.22
	27, Seattle Office, W. B. Hastings, A. T. M.....	20.00
	30, Seattle Office, W. B. Hastings, A. T. M.....	75.00
July	2, Seattle Office, W. B. Hastings, A. T. M.....	150.00
	SS. "Garonne" Voyage 1, Payroll crew....	5,217.10
	5, SS. "Garonne," Voyage 1, Payroll crew....	21.00
	Payroll crew, overtime.....	43.95
	6, Seattle Office, O. A. Hohansen..	166.85
	7, SS. "Garonne," Voyage 1, J. Knox, Commissioner.....	5.00
	J. Morrison, 2 days' labor.....	4.00
	General Expense, Postal Tel. Cable Co., June.....	18.46
	8, SS. "Garonne," Voyage 1, H. Alexander, 1 day.....	2.25
	9, SS. "Garonne," Repairs & Port Expense, Payroll week ending July 9, 1904.....	514.05

	11, Seattle Office, J. M. Shawhan Purser	18.75
	13, SS. "Garonne," Voyage 1, Balance payrolls	10.00
	SS. "Garonne," Repairs & port expense, payroll, July 12	10.40
	Purser, July 10, 13	21.67
	Forward	76,584.03
1904.	Brought forward	76,584.03
June 15,	SS. "Garonne," Voyage 1	
	Phoenix Commercial Stamp Works	103.20
	Benson, Morris Co.	6.90
	Globe Wall Paper Co.	50.75
	Quaker Drug Co.	85.33
	White Adv. Bureau	82.50
	Oxford Tailoring Co.	6.00
	W. Bowen & Co.	840.18
	Baker & Richards Co.	69.38
	Armour & Co.	1,376.20
	Greham, Merriam Co.	117.63
	SS. "Garonne," Repairs and Port Expense, Eilers Piano House	275.00
	C. M. Shaw & Co.	1,295.78
16,	SS. "Garonne," Repairs & Port Payroll week ending July 16.	321.50

SS. "Garonne," Voyage 1.....
J. B. Agen 786.84
21, General Expense..... .....
To apply on 2-½% disbursing
commission on $32,578.45... 217.18

82,218.40

[Endorsed]: Plffs. Exhibit 19. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 20.

(On Letterhead of Canton Insurance Office, Ltd.)

Seattle, Wash., Jan. 3rd, 1905.

Frank Waterhouse & Company, Inc., Burke Block, City.

Gentlemen:

S. S. GARONNE.

Replying to your inquiry. This vessel was covered by insurance during the period, July 1st to April 8th, as follows:

Issued May 30, 1904 $37500 one year at
12% prem.... ....$4500.00
Issued June 1, 1904 62500 six months
7-7/20% prem..... ..... 4471.11

Issued Nov. 30, 1904 62500 one year
1-3/4% prem..... .... 1093.75

This last policy was issued covering harbor risk upon the expiration of the policies written June 1st for $62500, the vessel being insured during the entire period for $100000, the rate on $37500 being 1% per month for six months from May 30th to November 30th; the rate on $62500 being 7-7/20%, ending November 30th. From November 30th to April 8th the rate was 1-3/4% per annum.

Yours very truly,

J. R. MASON.

[Endorsed]: Plffs. Exhibit 20. Eben Smith. United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 21.

Memorandum of Agreement made this the 9th day of July, 1904, between Wm. P. King of New York City, party of the first part, and Frank Waterhouse, of Seattle, Washington, party of the second part.

For and in consideration of the mutual covenants and agreements hereinafter expressed, the said parties mutually agree as follows:

First. The said Wm. F. King acting for both parties, will at once organize a corporation under the laws of the State of New York, to be known as the Merchants' and Miners' Steamship Company of New York, with a capital stock of one hundred thousand dollars ($100,000.00), such corporation to have all the powers usual and common to transportation companies. The Board of Directors shall be composed of five members and the board for the first year shall consist of the following persons: William F. King, Wm. R. Corwine and S. Cristy Mead, of the city of New York, and Frank Waterhouse and W. H. Bogle, of the City of Seattle. For the first year the President shall be Frank Waterhouse, the Vice-president W. H. Bogle and the Secretary S. C. Mead. The said Wm. F. King is to receive fifty thousand dollars par value of the capital stock, and the said Frank Waterhouse is to receive the other fifty thousand dollars par value of the capital stock.

Second. Upon the formation of said corporation, said Waterhouse will have Frank Waterhouse & Co., Inc., execute a bill of sale conveying to said new Company the steamship "Garonne," with her equipment, supplies and material on board, and also turn into the Treasury of said Company, the cash in the hands of Frank Waterhouse & Co., Inc., received from the last voyage of the "Garonne."

Third. The said Wm. F. King will advance to said new company, the sum of thirty thousand dollars ($30,000.00), in cash, to be applied in the payment and discharge of the claims now existing against the steamship for supplies, material, repairs, etc., said money to be deposited by said King in the Chase National Bank, New York, to the credit of Frank Waterhouse fifteen thousand dollars (15,000.00) thereof, on or before July 16th, 1904, and the remaining fifteen thousand dollars ($15,000.00) on or before July 23rd, 1904.

Fourth. Said new company shall executed a mortgage securing to said Wm. F. King the said sum of thirty thousand dollars ($30,000.00), and to said Frank Waterhouse & Co., Inc., the sum of thirty-seven thousand dollars, with interest on said amounts from July 15th, 1904. Said mortgage to contain the usual covenants and agreements contained in such instruments, but to provide specifically against any personal liability or stock liability of either of the parties hereto for any part of the indebtedness expressed in said mortgage. Said indebtedness to be represented by notes given by said mortgagor company to said respective parties as above, and each of the notes to be of equal rank under the mortgage, and to be payable at such time or times as said parties hereto may hereafter agree, and to bear interest at the rate of 6% per annum.

Fifth. Said Waterhouse shall advance to said new Company such amount as may be needed for the operation of the steamer during the present season.

Executed in duplicate above named.

(Signed) WM. F. KING.

(Signed) FRANK WATERHOUSE.

MEMO. OF NOTES.

KING NOTES.

$10,000 due Nov. 15th, 1904.
10,000 due June 5th, 1905.
10,000 due Nov. 15th, 1905.

$30,000

WATERHOUSE NOTES.

$12,000 due Nov. 15th, 1904.
13,000 due June 5th, 1905.
12,000 due Nov. 15th, 1905.

King $30,000
Waterhouse 37,000

$67,000

[Endorsed]: Plff. Exhibit 21. Eben Smith. United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 22.

BILL OF SALE OF REGISTERED VESSEL.

To all to Whom These Presents Shall Come, Greeting:

Know ye, that Frank Waterhouse & Co., Inc., of Seattle, Washington, Sole Owner of the screw steamer or vessel called the "Garonne" of Seattle, Washington, of the burden of 2319/100 tons, or thereabout, for and in consideration of the sum of one hundred and sixty-seven thousand ($167,000) dollars, lawful money of the United States of America, to it in hand paid, before the sealing and delivery of these presents, by Merchants' and Miners' Steamship Company of New York, Incorporated under the Laws of the State of New York, the receipt whereof it does hereby acknowledge and is therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said Merchants' and Miners' Steamship Company of New York, its successors, and assigns, the whole of the said steamer or vessel, together with the whole of the masts, bowsprit sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the certificate of the registry of which said steamer or vessel is as follows, viz.:

Register No. 108.

Official Number Numerals, 86504.

Letters, K. P. T. W.

In pursuance of Chapter One, Title XLVIII "Regulation of Commerce and Navigation," Revised Statutes of the United States, W. P. Prichard, Secy. of Frank Waterhouse Co., Inc., and R. McFarland, master, having taken and subscribed the oath required by law, and having sworn that The Frank Waterhouse and Co., Incorporated, is the only owner of the vessel called the "Garonne" of Seattle, Wash., whereof R. M. McFarland, is at present Master, and is a citizen of the United States, and that the said vessel was built in the year 1871, at Govan, Scotland, as appears by P. R. No. 48B, issued at Seattle, Wash., May 12, 1900. Surrd. O. C., and said register having certified that the said vessel has 4 decks and 3 masts, and that her length is 371 and — tenths feet, her breadth 41 feet and 4 tenths, her depth 20 feet and 4 tenths, her height 15 feet and 8 tenths; that she measures 2319 tons and — hundredths, viz:

	Tons	100ths
Capacity under tonnage deck.....	1938	19
Capacity between decks above tonnage deck	1962	93

Capacity of inclosures on the upper deck, viz:.....	44	54
Gross Tonnage.....3945		—

Deduction under Section 4153, Revised Statutes, as amended by Act of March 2, 1895:

Crew space, 233.79; Master's cabin, steering gear, anchor gear, boatswain's stores, 71.12; chart-house; donkey engine and boiler; storage of sails, 12.03; propelling power, 126.61		
Total Deductions....1626.17		1626.17
Net Tonnage.....		2319.

The following described spaces, and no others, have been omitted, viz., and that she is a Str. sc. (iron) has a figurehead and a elliptic stern; and the said —— having agreed to the description and admeasurement above specified, according to law, said vessel had been duly registered at the port of Port Townsend.

Given under my hand and seal, at the Port of Port Townsend, this 4th day of May, in the Year One Thousand Nine Hundred and one (1901).

No. (Seal)

[Seal] F. D. HEUSTIS, [Seal]

Collector of Customs.

[Seal of the United States Treasury.]

EUGENE TYLER CHAMBERLAIN,

Commissioner of Navigation.

Formerly Br. S/S "Garonne." Remeasured at Seattle, Wash., 1900.

To have and to hold the said whole of the steamer and appurtenances thereunto belonging, unto—the said Merchants' and Miners' Steamship Company of New York, its successors and assigns, to the sole and only proper use, benefit, and behoof or—the said Merchants' and Miners' Steamship Company of New York, its successors and assigns forever: And the said Frank Waterhouse & Company, Inc., has promised, covenanted and agreed, and by these presents does promise, covenant, and agree for its successors and assigns, to and with the said Merchants' and Miners' Steamship Company, of New York, its successors, to warrant and defend the said title of the said vessel and all the other beforementioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, the said Frank Waterhouse and Company, Incorporated, has caused these presents to be signed by Frank Waterhouse, its Present and its incorporated seal to be hereunto affixed, August 4, in the year of our Lord One Thousand Nine Hundred and four (1904).

Signed, sealed and delivered in the presence of

FRANK WATERHOUSE & COMPANY,
Incorporated. [Corporate Seal]
By (Signed) FRANK WATERHOUSE,
President.

[Seal] Attest: (Signed) W. H. BOGLE.
Secy.

(Signed)
W. D. BENSON.
L. E. BURT.

State of Washington,
County of King,—ss.

I, James P. Townsend, a notary public, in and for the State of Washington, residing at Seattle, in the above-named county and State, duly commissioned, sworn and qualified, do hereby certify that on this 4th day of August, A. D. 1904, before me personally appeared, Frank Waterhouse and W. H. Bogle, to me known to be the individuals, who as President and Secretary, respectively, of The Frank Waterhouse & Company, the corporation that exe-

cuted the within instrument and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal, this 4th day of August, 1904.

[Notarial Seal]

(Signed) JAMES P. TOWNSEND,
Notary Public in and for the State of Washington,
Residing at Seattle, County, said State.

Collector's Office, Port of New York.

I hereby certify the within to be a true copy of the original received by this office for record, 1 h 25 m P. M., and recorded in Book R. 149, page 16, September 22, 1904.

Given under my hand and the seal of the Collector, this 23d day of December, 1905.

J. J. C. BARRETT. [Seal]
G. W. H. P. Y.
Deputy Collector.

Fee 50¢ McH.

[Endorsed]: Plff. Exhibit 22. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Wash-

ington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 23.

THE UNITED STATES OF AMERICA.

Sections 4170, 4171, 4192, 4193, 4194, and 4196, Revised Statutes.

Ct. No. 517.

BILL OF SALE OF REGISTERED VESSEL.

To all to Whom These Presents Shall Come, Greeting:

Know ye, that The Merchants' and Miners' Steamship Company of New York, sole owner of the steamship or vessel, called the "Garonne" of the burden of 3945 gross tons or thereabouts, for and in consideration of the sum of ninety thousand lawful money of the United States of America, to them in hand paid, before the sealing and delivery of these presents, by White Star Steamship Company of Seattle, Washington, U. S. A., the receipt whereof we do hereby acknowledge and are herewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said White Star Steamship Company of Seattle, Washington, its successors, executors, administrators, and assigns, the whole of the said steamship or vessel, together with the masts, bowsprit, sails, boats, anchors, cables, tackle, fur-

niture, and all other necessaries thereunto appertaining and belonging the certificate of registry of which said ship or vessel is as follows, to wit:

Temporary

Registry No. 54 Official Number.
Numerals. Letters.
86504 KPTW.

CERTIFICATE OF REGISTRY.

In pursuance of Chapter I, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States, Frank Waterhouse, of Seattle, Washington, President, having taken and subscribed the oaths required by law, and having sworn that the Merchants' and Miners' Steamship Company, of New York, a corporation organized under the laws of the State of New York is the only owner of the vessel called the "Garonne" of New York whereof John Jordeson is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1871, at Govan, Scotland, as appears by P. R. #108, issued at Port Townsend, Wash., May 4, 1901; surrendered, O. & Dist. C.; and said Register having certified that the said vessel has Four decks and Three masts; and that her length is 371 and 0 tenths; her breadth 41 feet and 4 tenths; her depth 20 feet and 4 tenths; her height —— feet and —— tenths; that she measures Twenty-three hundred and nineteen tons, viz.:

	Tons.	100ths.
Capacity under tonnage deck	1938	19
Capacity between decks above tonnage deck	1962	93
Capacity of inclosures on the upper deck, viz:	44	54
Gross Tonnage	3945	
Deductions under Section 4153, Revised Statutes, as amended by Act of March 2, 1895:		
Crew space, 233.79; Master's cabin	233	79
Steering gear: Anchor gear 46.62	46	62
Boatswain's stores, 71.12, Chart house, Storage of sails, 12.03	83	15
Donkey engine and boiler, Propelling power 1262.61	1262.61	
Total deduction	1626.17	
Net Tonnage	2319	

The following described spaces, and no others, have been omitted, viz: and that she is a Screw Str. (Iron), has a figurehead and an elliptic stern; and the said—having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at the Port of Port Townsend, Wash.

Given under my hand and seal at the Port of Port Townsend, this 6th day of August, in the year one thousand nine hundred and four.

No. (Seal) CHAS. MILLER,
Dep. Collector of Customs (Seal)
Naval Officer.

EUGENE TYLER CHAMBERLAIN,
Commissioner of Navigation.

[Seal of Department of Commerce and Labor.]

To have and to hold the said Steamship "Garonne," her furniture, equipments and appurtenances thereunto belonging unto them the said White Star Steamship Company of Seattle, Washington, its successors, executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of them the said White Star Steamship Company, its successors, administrators, and assigns forever: And we the said The Merchants' and Miners' Steamship Company, of New York, for ourselves, our successors have and by these presents do promise, covenant, and agree, for ourselves, our heirs, executors, and administrators, to and with the said White Star Steamship Company, its successors, heirs, executors, administrators, and assigns to warrant and defend the said title to the said Steamship "Garonne," her furnishings, equipment, and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, we the said The Merchants' and Miners' Steamship Company, of New York, have hereunto set our hands and seals this 27th day of April, in the year of our Lord one thousand nine hundred and five.

Signed, sealed, and delivered in presence of—

[Seal Merchants' and Miners' Steamship Company.]

MERCHANTS' AND MINERS' STEAMSHIP COMPANY, OF NEW YORK.

By FRANK WATERHOUSE,

President.

By W. H. BOGLE,

Secretary.

State of Washington,
District of Puget Sound,
County of King,—ss.

On this 28th day of April, A. D. one thousand nine hundred and five, before me, Frank P. Dow a Notary Public in and for the said King County, duly commissioned and sworn, personally appeared the within named Frank Waterhouse and W. H. Bogle, personally known to me to be respectively President and Secretary of Merchants' and Miners' Steamship Company, of New York, a corporation, whose names are subscribed to the annexed instrument as party thereto, personally known to me to be the individual described in, and who executed the said annexed

instrument for and on behalf of said corporation and who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned for and on behalf of said company and as its act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] FRANK P. DOW,
Notary Public in and for the State of Washington,
Residing at Seattle.

I certify this to be a correct copy of the Original Bill of Sale on record in this office.

Custom-house, Port Townsend, W., De. 29th, 1905.

[Seal] HENRY BLACKWOOD,
Deputy Collector, Dr.

[Endorsed]: Copy Cat. No. 517. Department of Commerce and Labor, Bureau of Navigation. Bill of Sale of Registered Vessel. Merchants' and Miners' Steamship Company to White Star Steamship Company. Steamship called the "Garonne."

Custom-House, Port Townsend, Wash.,
May 3d, 1905.

Received for Record 3 h. 0 m. P. M. Recorded, book 13, page 65.

J. PAYNE,
Acting Clerk.

[Endorsed]: Plffs. Exhibit 23. Eben Smith, United States Master in Chancery, Western District of Washington, Northern Division. Filed in the U. S. Circuit Court, Western Dist. of Washington, June 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 24.

(On Letterhead of Frank Waterhouse & Co., Inc.)

Seattle, Wash., Aug. 19, 1904.

Mr. F. S. Pusey, #1 Broadway, New York, N. Y.

Dear Sir: The enclosed letter of August 2nd, with stated enclosures, was mailed to you on August 3rd to #101 Broadway, as you will note by the enclosed envelope, which was returned to us, by the N. Y. P. O. not being able to make delivery. Mr. Chapin has now given us your address as #1 Broadway, and we hope that this will reach you.

Yours truly,

J. P. TOWNSEND,

Treas.

R. Enc.

Filed in the U. S. Circuit Court, Western District of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 25—In Rebuttal.

CERTIFICATE OF INCORPORATION
of the
MERCHANTS' & MINERS' STEAMSHIP COMPANY OF NEW YORK.

We, the undersigned, all being persons of full age, and at least two-thirds of us being citizens of the United States, and one of us a resident of the State of New York, for the purpose of becoming a Navigation Corporation for the business hereinafter specified, pursuant to the provisions of Article 2 of the Transportations Corporations Law of the State of New York, do hereby certify as follows, to wit:

I. The name of the corporation is to be:

"MERCHANTS' & MINERS' STEAMSHIP COMPANY OF NEW YORK."

II. The objects for which the corporation is to be formed are the following, namely:

For the purpose of building, for its own use, equipping, furnishing, fitting, purchasing, chartering, navigating or owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce or navigation, and to establish, maintain and operate a line of steam, sail or other boats, ships or vessels, and for the carriage, transportation or storing of lading, freight, mails, merchandise and all other property of what-

soever description, or passengers; to own, buy, sell, or lease docks, piers, yards, warehouses and other facilities for carrying on its said business and to do any and all things which may be necessary, desirable or convenient in connection with its said business, subject, however, to the restrictions of the laws of the State of New York and of the United States of America.

III. The waters to be navigated are: The bay harbor of New York, the ports, bays, inlets, sounds and waters along the Atlantic Coast of Canada, the United States of America, and South America, along the Pacific Coasts of South America, Mexico, the United States of America, including Alaska, and Canada, and especially between the port of New York and the port of Seattle, and the principal ports intervening on the usual routes of navigation, and also between the port of Seattle and the port of Nome and the principal ports intervening on the usual routes of navigation; also the coasts of Japan, of Russia in Asia, Corea, China, India, the Hawaiian and Philippine Islands, and between the ports of the said coasts and the ports on the Pacific Coasts of the United States of America.

IV. The amount of its capital stock is to be One Hundred Thousand Dollars (100,000.00).

V. The term of its existence is to be fifty (50) years.

VI. The number of shares of which the capital stock shall consist is to be one thousand (1000) of the par value of One Hundred Dollars ($100.00) each.

VII. The corporation is to have five (5) Directors.

VIII. The names of the Directors for the first year are:

Name Postoffice Address

Arthur J. Baldwin, 27 Pine Street, New York City, N. Y.

Frank M. Van Wagonen, 27 Pine Street, New York City, N. Y.

Emory W. Uhman, 27 Pine Street, New York City, N. Y.

Frank A. Clary, 27 Pine Street, New York City, N. Y.

C. Strawder Batt, 27 Pine Street, New York City, N. Y.

IX. The principal office is to be situated in the Town Waverly, Tioga County, New York.

X. The number of shares which each subscriber of this certificate agrees to take in such corporation is as follows:

Arthur J. Baldwin, 94, 27 Pine Street, New York, N. Y.

Frank M. Van Wagonen, 1, 27 Pine Street, New York, N. Y.

Emory W. Ulman, 1, 27 Pine Street, New York, N. Y.

Frank A. Clary, 1, 27 Pine Street, New York, N. Y.

C. Strawder Batt, 1, 27 Pine Street, New York, N. Y.

M. J. Duffy, 1, 27 Pine Street, New York, N. Y.

H. T. Mead, 1, 27 Pine Street, New York, N. Y.

XI. The corporation may purchase, acquire, hold and dispose of the stock, bonds and other evidence of indebtedness of any public or private corporation, domestic or foreign, and issue in exchange therefor its own stock, bonds or other obligations.

In witness whereof, we have made, signed, acknowledged and filed this certificate in duplicate.

Dated July 11th, 1904.

ARTHUR J. BALDWIN.
FRANK M. VAN WAGONEN.
EMORY W. ULMAN.
FRANK A. CLARY.
C. STRAWDER BATT.
M. J. DUFFY.
H. T. MEAD.

State of New York,

County of New York,—ss.

On this 11th day of July, 1904, before me personally came M. J. Duffy, H. T. Mead, C. Strawder Batt,

Frank A. Clary, Emory W. Ulman, Frank M. Van Wagonen and Arthur J. Baldwin, to me severally known to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

EDWARD T. MAGOFFIN,
Notary Public,
New York Co.

State of New York,
County of New York,—ss.

Arthur J. Baldwin, Frank M. Van Wagonen and Emory W. Ulman, being severally duly sworn, depose and say, and each for himself deposes and says: That he is one of the directors named in the foregoing certificate; that at least ten per cent of the amount of capital stock named therein has been, in good faith, subscribed and at least ten per cent of such subscriptions have been paid in cash.

ARTHUR J. BALDWIN.
FRANK M. VAN WAGONEN.
EMORY W. ULMAN.

Severally sworn before me this 11th day of July, 1904.

[Seal] EDWARD T. MAGOFFIN,
Notary Public.
New York Co.

[Endorsed]: Certificate of Incorporation of the Merchants' & Miners' Steamship Company of New York. Tax for Privilege of Organization of this Corporation $50. Under Chapter 448, Laws of 1901. Paid to State Treasurer Before Filing. State of New York. Office of the Secretary of State. Filed and Recorded Jul. 12, 1904. J. B. H. Mongin, Deputy Secretary of State.

State of New York,
Office of the Secretary of State,—ss.

I have compared the preceding with the original Certificate of Incorporation of "Merchants' & Miners' Steamship Company of New York," filed and recorded in this office on the 12th day of July, 1904, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this twenty-ninth day of December, one thousand nine hundred and five.

[Seal] HORACE G. TENNANT,
Second Deputy Secretary of State.

[Endorsed]: Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 26—In Rebuttal.

UNITED STATES OF AMERICA,
STATE OF NEW YORK.

By

JOHN F. O'BRIEN.

Secretary of State and Custodian of the Great Seal Thereof.

It is hereby certified, that Frank D. Cole, was on the day of the date of the annexed Certification and Attestation, Deputy Secretary of State of the State of New York, and duly authorized by the laws of said State to make such Attestation and Certificate and to perform the duties belonging to the Secretary of State in making such Attestation and Certificate, in like manner as said Secretary of State; that the said Certificate and Attestation are in due form and executed by the proper officer; that the Seal affixed to said Certificate and Attestation is the Seal of office of the Secretary of State of the State of New York; that the Signature thereto of the said Deputy Secretary of State, is in his own proper handwriting, and is genuine; and that full faith and credit, may and ought to be given to his official acts; and, further, that the Secretary of State is the Custodian of the original certificate under Section 5 of the Business Corporations Law so certified and at-

tested and Custodian of the Great Seal of said State, hereto affixed.

In testimony whereof, the Great Seal of the State [Seal] is hereunto affixed.

Witness my hand at the city of Albany, the eleventh day of May in the year of our Lord one thousand nine hundred and six.

JOHN F. O'BRIEN.

Secretary of State.

MERCHANTS' & MINERS' STEAMSHIP COMPANY OF NEW YORK.

CERTIFICATE OF PAYMENT OF ENTIRE CAPITAL STOCK.

We the undersigned, being a majority of the directors of the Merchants' & Miners' Steamship Company of New York, a corporation formed under the provisions of the Transportation Corporations Law of the State of New York, do hereby certify that the amount of the capital stock of said corporation is One Hundred Thousand Dollars ($100,000), and that it has been entirely paid in in cash and property.

In witness whereof we have made, signed and acknowledged this certificate in duplicate, this 29th day of September, 1904.

FRANK A. CLARY,
C. STRAWDER BATT,
ARTHUR J. BALDWIN,
A Majority of the Board of Directors.

State of New York,
County of New York,—ss.

On this 29th day of Sep., 1904, before me personally came Frank A. Clary, C. Strawder Batt and Arthur J. Baldwin, to me personally known, and known to me to be the persons described in and who executed the foregoing certificate and severally acknowledged to me that they executed the same.

EDWARD F. MAGOFFIN,
Notary Public.
New York Co.

State of New York,
County of New York,—ss.

Frank A. Clary and C. Strawder Batt being severally duly sworn each for himself deposes and says that the said Frank A. Clary is the president and

the said C. Strawder Batt is the secretary of the Merchants' and Miners' Steamship Company of New York, and that the statements contained in the foregoing certificate are true and that the same is subscribed by a majority of the Board of Directors.

FRANK A. CLARY.
C. STRAWDER BATT.
ARTHUR J. BALDWIN.

Sworn to before me this 29th day of Sept., 1904.

EDWARD F. MAGOFFIN,
Notary Public,
New York Co.

[Endorsed]: Merchants' & Miners' Steamship Company of New York. Certificate of Payment of Entire Capital Stock. State of New York. Office of Secretary of State. Filed and Recorded Oct. 4, 1904. J. B. H. Mongin, Deputy Secretary of State.

State of New York,
Office of the Secretary of State,—ss.

I have compared the preceding with the certificate under Section 5 of the Business Corporations Law of Merchants' & Miners' Steamship Company of New York, filed and recorded in this office on the 4th day of October, 1904, and do hereby certify the same to be a correct transcript therefrom and the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this eleventh day of May, one thousand nine hundred and six.

[Seal] FRANK O. COLE,
Secretary of State.

[Endorsed]: Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "A."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, February 3, 1904.

W. H. Ferguson, Fifth Avenue Hotel, New York, N. Y.

Your thousand received and accepted and I now confirm sale of "Garonne," provided you pay me fourteen thousand dollars, February fifteenth, deferred payments to be made as follows: Ten thousand dollars March fifteenth, ten thousand June fifteenth, five thousand September fifteenth, five thousand November fifteenth, all this year; five thousand February fifteenth, five thousand April fifteenth, five thousand June fifteenth, five thousand August fifteenth, five thousand October fifteenth, ten thousand December fifteenth, all nineteen five; five thousand March fifteenth nineteen six, deferred payments to be secured by first mortgage on steamer,

assignment marine insurance, corporation bond guaranteeing vessel against indebtedness, and other security which shall be satisfactory to me. Sale conditioned on terms and representations my letter to you January twenty-sixth. Confirm this understanding.

FRANK WATERHOUSE.

FW.

[Endorsed]: Exhibit "A." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "B."

January 26, 1904. B

Captain W. H. Ferguson, Assistant Manager De Soto Placer Mining Co.

Dear Sir: Your Mr. W. B. Hastings has lately had some conversation with me, regarding the purchase of our steamer "Garonne," and in connection therewith, he has asked me to write to you, briefly stating the terms at which I am willing to dispose of this vessel, the condition in which she now is, and the work that would have to be done to her, in order to put her into commission.

I will sell "Garonne" for $85,000, to be paid $25,000 in cash, on the date of transfer, and the balance divided into six ninety day payments, bearing in-

terest at the rate of seven per cent per annum, and the deferred payments to be satisfactorily secured by mortgage on the steamer, an assignment of the marine insurance policies on the steamer, in an amount sufficient to cover the deferred payments, with the guarantee of a surety company that no debts shall be incurred by the steamer, which would become a lien against her, and take precedence of my mortgage, and by such other collateral as would be acceptable and satisfactory to me.

Or I will sell the "Garonne" for $75,000 spot cash.

Yesterday I handed Mr. Hastings the particulars of this vessel, which I believe he intends to forward to you, and from which you will be able to judge of her, in a general way. The steamer is now lying out of commission at Quartermaster Harbor, near Tacoma. It will require the expenditure of about $7500 to put her in commission again; this amount to be spent in connecting up her machinery, drydocking and painting her, and refurnishing some of her passenger accommodations. Although "Garonne" is an old ship, she has been pronounced by the United States Inspectors here and by Lloyds Inspectors, both here and in British Columbia, and also by Lloyds Inspectors in San Francisco, to be the staunchest vessel on the Pacific Ocean to-day. She is built of iron, and is an exceptionally heavy ship, and in spite of her age, no apparent

deterioration of any kind in any spot, has taken place in her hull, or in the thickness of her plating. She was examined thoroughly by the Superintendent Engineer of the Pacific Coast Steamship Company a few months ago, who reported to his Company that her hull alone was cheap at $100,000. Her engines are compound; they are in good condition, and have been well taken care of during the period she has been laid up out of commission. $44,000 was spent in her boilers two years ago; her furnaces are entirely new; boiler tubes are new; combusion chambers are new; and the boilers are in first-class condition in every respect, as far as I know. Of course, "Garonne" is not as economical a boat to operate, as she would be if her engines were triple expansion, instead of compound, and if she had a more modern plant in her, but for the price at which I offer her, and for the Northern Alaska trade, she cannot be beaten in any market in the world. I bought this boat in London, five years ago, from the Orient Steam Navigation Company, at a cost of £18,000. Her condition now is a great deal better than it was then, on account of the large amount of money we have spent on her boilers, which was the weak spot in her, since we bought her. Moreover, we have secured American register for her, since we have owned her. She is a vessel that

you can run in her present condition to advantage, in the Northern Alaska trade, for several years to come, and at the end of that time, her hull will still be in good enough condition, to give her new machinery and new boilers, if you so desire. A few months ago I was offered $40,000 for the iron in the hull of this steamer alone, by a junk dealer in Shanghai. I think the steamer is fully equipped with glassware, cutlery, crockery, all kinds of linen, blankets, and all necessary passenger equipment and life saving appliances, for her full complement of passengers. This equipment has been carefully stored away and protected while the steamer has been out of commission, and it all goes with the steamer. It would probably take you two or three weeks to do the necessary work on her, to pass her inspection and to put her in commission.

"Garonne" has always been a very popular boat in the Alaska trade, and we have never failed to secure for her a full share of all the business that has been moving. If you are in the market for a steamer for the Northern Alaska trade, I am very sure that you cannot secure such a bargain as this anywhere else. We have made a great deal of money with this steamer since we bought her, and I can say that she has never made an unprofitable voyage to Alaska, since we began operating her. My reasons for offering her for sale, are on account of a desire

to drop out of the Alaska passenger trade, and on account of our inability to engage in it to advantage, in connection with other business interests that we have, and also for other reasons which I have explained personally to Mr. Hastings.

Several other parties are now figuring with me, on the purchase of this steamer, for use in the Northern Alaska trade, and I think there is little doubt that she will be disposed of at an early date; I therefore suggest that if she strikes you favorably, you should consider the matter of her purchase at once.

Yours truly,

[Endorsed]: Exhibit "B." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "C."

(On Blank of Postal Telegraph-Cable Company.)
94 Vr. N. R. 47 Duplicate, (Corrected Copy)

New York, N. Y., June 1th, 1904.

Frank Waterhouse, Burke Building, Seattle, Wn.

Extending time of Steamship payments requested by Leake in todays telegram will be personally appreciated by me and will aid us greatly in avoiding censure here for embarrassing position caused by

demands for excessive supplies this concession by you is sure to work to your credit later.

W. H. ROWE.

3:30P

[Endorsed]: Exhibit "C." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "D."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, June 15, 1904.

W. H. Rowe, Care Occidental Securities Co., 42 Broadway, New York City.

When your telegram arrived yesterday was out of town. Message repeated over telephone and misunderstood. Certainly agree let conditions my telegram thirteenth stand until arrival Mead early next week. Strongly advise you remit money promptly pay debts now due protect your own credit, save me embarrassment. If you will remit six thousand expenses by tomorrow will stand off balance bills until next week.

FRANK WATERHOUSE.

Rush.

[Endorsed]: Exhibit "D." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "E."

(On Letterhead North-Alaska Steamship Company.)

New York, June 8th, 190—.

Mr. Frank Waterhouse, Seattle, Wash.

Dear Sir: Without any more information than that given in the dispatches by Mr. Smith in regard to the settlement, in the absence of Mr. Rowe, the writer deems it advisable to ask you in regard to the discount ($3500) which was understood was to be allowed in the cash settlement. Inferring from the telegram that there was no discount allowed, it is reasonably supposed if the payment is made according to the settlement, it is practically cash, and would justify the Company to expect the discount according to the understanding. If the discount be not allowed, it seems fair that we should have the right to have the payment extended according to the original proposition rather than paying the whole sum as arranged in the settlement. Please write us fully in regard to this.

We would like to hear from you in regard to the business prospects as often as you can conveniently

write us. Of course we lack the desired information regarding the first sailing, until we have the reports which you probably have sent us by this time.

Very truly yours,

J. B. LEAKE,

P. S.—Does the Steamship carry mail. Have you any suggestion regarding that subject.

[Endorsed]: Exhibit "E." Filed in the U. S. Circuit Court, Western District of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "F."

(On Letterhead of McKee & Frost, Counsellors at Law.)

June 10, 1904.

Frank Waterhouse, Esq., Seattle, Washington.

Dear Sir: The Secretary of the North-Alaska Steamship Company, Mr. John B. Leake, has just called upon us to examine the bill of sale and mortgage at the Chase National Bank in the matter of the transfer of the Steamship "Garonne."

Before the Board of Directors authorize their secretary and treasurer to sign the proposed mortgage, they wish to have before them all the particulars of the recent transactions in Seattle, which led up to the execution of that instrument, and a full state-

ment of the Steamship accounts to and including the first sailing.

They expect this report and statement at any moment, and upon receipt of same will be in a position to hold a meeting on short notice and proceed intelligently to act in your matter.

As you are doubtless aware, new interests have been added to the Company, and require a little time to become familiar with its affairs.

Trusting that remaining details may be satisfactorily adjusted in a little while, we remain,

Yours truly,

McKEE & FROST.

[Endorsed]: Exhibit "F." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "G."

(On Blank of Postal Telegraph-Cable Company.)
237. SF. GC. S. 48.

New York, June 15th, 1904.

Frank Waterhouse, Seattle, Wn.

Have consulted with those who have thus far financed our enterprise. They insist that no more money shall be paid until Mr. Mead has personal interview with you and goes over condition at Seattle.

I trust you will await Mr. Meads arrival he left today for Seattle direct.

W. H. ROWE.

7:25 P. M.

[Endorsed]: Exhibit "G." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "H."

Copy.

The Western Union Tel. Co.

New York, June 15, 1904.

Washington National Bank, Seattle, Wn.

Respecting payments made to Waterhouse on boat we are requested by parties of responsibility and reputed wealth recently associated with Occidental Securities Co. to advise that pending payments will be made on satisfactory report by representative now en route. Notify Waterhouse Abase.

CHASE NATIONAL BANK.

[Endorsed]: Exhibit "H." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "I."

(On Blank of Western Union Telegraph Company.)

9. CH. KD. A. 56 Paid.

NC, New York, June 14th, 1904.

Frank Waterhouse and Co., Burke Bldg., Seattle, Washn.

Letter and telegrams submitted to financial interests which have thus far financed the securities Co., they have auditor now going over books and accounts will you kindly let conditions of your telegram of the thirteenth stand till the arrival of Mr. Mead our representative who leaves for Seattle Wednesday. Will stop at Rainier Grand Hotel.

2:57PM.

W. H. ROWE.

[Endorsed]: Exhibit "I." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "J."

(On Blank of Postal Telegraph Commercial Cables.)

163 Vr. Af.R.8

New York, N. Y., June 13th, 1904.

Frank Waterhouse, Seattle, Wn.

Thanks for concession does thirteen thousand cover insurance.

J. B. LEAKE.

5P

[Endorsed]: Exhibit "J." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "K."

(On Blank of Postal Telegraph-Cable Company.)

129. Sf. Rb. G. 47

New York, June 11, 1904.

Frank Waterhouse, Burke Building, Seattle, Wash.

Extending to me of steamship payments requested by Leake in today's telegram will be personally appreciated by me and will aid us greatly in avoiding censure here for embarrassing position caused by demands for excessive supplies this concession by you is sure to work to your credit later.

W. H. ROWE.

[Endorsed]: Exhibit "K." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "L."

(On Blank of Postal Telegraph-Cable Company.)

138. Sf. Wf. G. 84.

New York, June 11, 1904.

Frank Waterhouse, Seattle, Wash., Burke Building.

Letter June third received today expenses "Garonne" hard rap following low receipts and expected discount disallowed management prejudiced by underestimate cash required if we pay thirteen thousand expenses immediately cannot notes and mortgage be made eighteen thousand six hundred July twelfth eighteen thousand six hundred August fifteenth then within estimate to personal relief of management your co-operation solicited instructed Hastings confer with you all matters steamship operation and expense fill no requisitions material or supplies unless absolutely necessary when will we receive complete statement.

J. B. LEAKE.

1:33 p. m.

[Endorsed]: Exhibit "L." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "M."

(On Blank of Postal Telegraph Commercial Cables.)

35 Vr. N. R. 10

New York, N. Y., June 10, 1904.

Frank Waterhouse, Seattle, Wn.

Attend matter quick letters advise you Smith comes daily expected.

J. B. LEAKE.

3:20P

[Endorsed]: Exhibit "M." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "N."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, June 14, 1904.

W. H. Rowe, 42 Broadway, New York City.

Will not let conditions remain as at present. Insist debts against "Garonne" now due be paid immediately and mortgage be executed immediately. Will expect prompt reply stating definitely what you intend to do.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "N." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "O."

(On Blank of Postal Telegraph Commercial Cables.)

179 SF GC. W. 10

New York, May 18.

Frank Waterhouse, Seattle.

Arrangement payment to-morrow. Smith disabled mothers sickness and death today.

J. B. LEAKE.

550pm.

[Endorsed]: Exhibit "O." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "P."

(On Letterhead of The CHASE National Bank.)

New York, June 9th, 1904.

Frank Waterhouse, Esq., 205 Burke Building, Seattle, Wash.

Dear Sir: Your letter of the 3rd inst. has been received enclosing a bill of sale of the Steamer "Garonne," together with a mortgage on that vessel.

We have notified Mr. J. B. Leake that we have received the papers, and he stated that he would call upon us in connection with the transaction probably tomorrow or the next day. When the mortgage has been executed by him we will advise you further.

Yours very truly,

M.L.Z. C. C. SLADE,
Assistant Cashier.

[Endorsed]: Exhibit "P." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Q."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, June 11, 1904.

John B. Leake, Care Occidental Securities Company,
42 Broadway, New York.

Underwriters demand immediate payment Garonne insurance, amounting to sixty-six hundred. They decline to issue covering notes and threaten cancel insurance unless premiums paid immediately. Smith Ferguson assured me money this purpose would be remitted from New York immediately after ship sailed. Must be telegraphed without fail reach me Monday. Answer.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "Q." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "R."

June 14, 1904.

J. B. Leake, Sec'y & Treas. North Alaska Steamship Company, Rooms 1416-20, 42 Broadway, New York City.

Dear Sir: Replying to your letter of the 8th inst., I beg to say that the discount on the purchase price of the "Garonne," $3,500.00, was offered to you on condition that $81,500.00 cash was paid to me on or before May 15th last. You failed to pay this cash, and therefore my offer of discount will lapse. I cannot at all coincide in your opinion that the payments as now agreed to are practically cash payments. I have been very much embarrassed on account of the sale of this steamer, and inasmuch as I was able to sell the steamer to other parties on the same day I sold it to you, for the same amount of money, from whom I firmly believe I would have received the payment in full, before this time, I think under the circumstances I have treated you very leniently. I quite understand the difficulties you have had to face, and I am anxious to accommodate myself to your needs in every way I can do so.

In view of the telegrams that passed between us yesterday, I expect you will promptly remit enough money to pay for the insurance, the balance of the bills that are due, and that you will pay me on account of the note due June 22nd, $8600.00, and the balance of payments as indicated in my telegram of yesterday, $10,000, with interest on the first note on July 12th, and the second note in full, on August 15th.

I am unable to send you a statement covering earnings and disbursements of the "Garonne" to date, until we can secure from Mr. Hastings a statement covering receipts and disbursements of your own office. We have been promised this statement for the last week, and yesterday I was again promised it by Mr. Hastings not later than tomorrow. If we get it tomorrow, we can make up our complete statement, and forward it to you on Thursday.

Regarding future business, I have to say that if you can make your next round voyage without suffering any loss, you will do very well. Both cargo and passengers are always scarce for the second voyage in each season, and those who operate their boats on this voyage without loss are, in my opinion, very fortunate. I think we can accomplish this by cutting down the expenses of the steamer very considerably. If I have the authority from you to do so, I shall insist that both the deck crew and at least 50%

of the steward's crew are cut out as soon as the steamer returns to port, and that not a single man in any department remains by the steamer while she is in port, except those who are actually required to prepare her for her next voyage. You will of course realize that these matters of expense require most careful consideration and the closest attention, which, if they do not receive, much unnecessary expense and loss of profit will result. I have never made a losing trip with "Garonne" to Northern Alaska, but she has been operated very conservatively and with great regard to her earnings and expenses. I think the most sensible way would have been for you to have placed, or even to now place, the operation of the steamer in my hands, for the present at least. When Capt. Ferguson left here, it stood that all questions of operation would be in charge of Mr. Hastings, and that we should only have charge of traffic matters. I have had so much more experience, however, with this particular steamer than anyone else has had, that I ought to be able to handle her to better advantage than almost anyone else can. At any rate, I am very willing to operate her for you to the very best of my ability, without making and extra charge therefor, if you desire me so to do. On the third voyage, the steamer ought to make some money, and on the fourth voyage, she ought to do very well indeed. You will of course bear in mind

that the expense of subsequent voyages will not be nearly as heavy as the expense of the first voyage. Do not expect, however, to get any profit from the second voyage.

All of the Alaska steamers, including the "Garonne," carry mail, for which they are paid at the rate of 1, ½ cents per pound. None of the steamers have a regular mail contract, nor is it proposed by the P. O. Department, to change the present method by making any such contract.

Please bear in mind that a pay-roll of between $5,000 and $6,000 will be due on this steamer, on the day she reaches Seattle from Cape Nome. Capt. Ferguson and Mr. Smith both assured me that this amount of money would be sent down on the steamer, in charge of the purser, to pay these wages. If they keep their word in this respect, all will be well; but I think that it is wise to anticipte the possibility of their not doing this.

My services are at your command, and you may rest assured that I will protect your interests in every way I can, to the extent of the authority I have.

Yours truly,

[Endorsed]: Exhibit "R." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "S."

Seattle, June 13, 1904. B.

(On Blank of Postal Telegraph-Cable Company.)

John B. Leake, Occidental Securities Co., 42 Broadway, New York City.

Thirteen thousand does not include insurance. Hastings promises furnish his statement, which is necessary complete mine, by Wednesday; will then forward mine promptly.

Garonne FRANK WATERHOUSE.

[Endorsed]: Exhibit "S." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "T."

(On Blank Postal Telegraph-Cable Company.)

Seattle, June 13, 1904.

J. B. Leake, Care Occidental Securities Co., 42 Broadway, New York City.

If you remit thirteen thousand to-morrow for expenses, execute mortgage at Chase National immediately and pay me eight thousand, six hundred June twenty-second, I will extend balance of payments as follows; Ten thousand with interest on first note until July twelfth; entire amount of second note until August fifteenth. Answer.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "T." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "U."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, June 10, 1904.

J. B. Leake, 42 Broadway, New York City.

Have you executed mortgage and remitted money pay expense bills here? These matters pressing; require immediate attention.

Answer.

Special Rush.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "U." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "V."

June 3, 1904.

Chase National Bank, New York City.

Gentlemen: I enclose herewith, bill of sale of the steamer "Garonne" from Frank Waterhouse & Co., Inc., to the North Alaska Steamship Co.; also, mortgage on same steamer, from the North Alaska Steamship Company to Frank Waterhouse & Co.

You will note that this mortgage has already been signed by Chas. B. Smith, President of the North

Alaska Steamship Co., but it still requires the signature of the Secretary of that Company, Mr. J. B. Leake, #42 Broadway. I have written Mr. Leake to-day, informing him that the deed and mortgage have been sent to you, and have asked him to step over to your Bank and execute the mortgage and receive the deed from you in return for so doing. Will you kindly, therefore, deliver the deed to Mr. Leake, after he has executed the mortgage as Secretary of the North Alaska Steamship Company; also kindly see that his signature is properly witnessed and acknowledged before a Notary Public. After the mortgage is completed, please return it to me here. Also please return to me the bill of sale of this same vessel, which was left with you by Mr. R. McGinnis some weeks ago, and greatly oblige,

Yours truly,

Enc.

[Endorsed]: Exhibit "V." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "W."

June 3, 1904.

Mr. J. B. Leake, c/o Occidental Securities Co., 42 Broadway, New York City.

My dear Mr. Leake:

For your information, I enclose herewith, copy

of a letter I have written to the Chase National Bank, to-day. The deed and mortgage mentioned therein, should arrive at the Chase National Bank, by the time you receive this letter. Will you please therefore, go over to that bank promptly, and execute the mortgage, as Secretary of the North Alaska Steamship Company, accepting the deed from the Chase National Bank, in return therefor? Mr. Smith assured me that I could depend upon your prompt action in this respect.

You are, of course, aware that the deed to the steamer must be recorded in the Custom House here. I suggest that you either promptly return the deed to a bank in Seattle, to be recorded for you, or send it back to me for that purpose. If you choose to do the latter, I will have it recorded in the Custom House at Port Townsend, immediately after its receipt by me, and after it is recorded, will return it quickly to you. I imagine it will not be necessary to keep the deed here, for the purpose of recording it, for more than three or four days.

Enc.

Very truly yours,

[Endorsed]: Exhibit "W." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "X."

June 3, 1904.

Occidental Securities Company, 42 Broadway, New York City.

Dear Sirs: Mr. Smith has doubtless advised you, as he promised me yesterday he would do, that on account of the condition of the expenditures and receipts for and from "Garonne," I was compelled at the last moment to agree to an arrangement which was exceedingly unsatisfactory to me. Instead of receiving the balance of the purchase price of this steamer, in cash or proper securities, for the amount still due, according to the terms of her sale, I was practically forced to accept the company's notes at 20 and 40 days, secured by first mortgage on the steamer, and $18,600 of the receipts of freight and passengers, in settlement. I should not have objected to this settlement if it had not been for the fact that the bills contracted by your people on the credit of the "Garonne," were largely in excess of what I imagined they would be, and had been given to understand by your people, they would be. These bills exceeded the largest amount that Capt. Ferguson had named to me, by about $13,000. Until yesterday afternoon, when most of the bills were received, I was under the impression that we had received sufficient money from you on account of ex-

penses, to pay all the bills, not including the $5,000 I received from you on account of purchase, on June 1st. This $5,000 I was compelled to relinquish and credit to expense account, and after doing so, there still remained a balance of about $13,000 of expenses which I regret to have to ask you to meet very promptly. As near as I can judge the matter, the increased expenses were incurred in largely overstocking the steamer with provisions and supplies. These provisions and supplies were purchased by us on the order of Capt. Ferguson, and we were without authority to limit him in the premises. He expected to carry out 600 passengers, and provisions were purchased for that number, with an extra full supply for 600 passengers and 100 crew for 30 days, in case of accident. Of course, these supplies are on board the steamer and covered by insurance, and will be on hand for another voyage; but it unfortunately means that they will have to be paid for now, instead of when they will be actually required.

However, it is no use to criticise anyone now. The bills have been incurred, and they have got to be met promply. The steamer herself is in A-1 condition and is a valuable piece of property, with a big earning power, good for many years to come. In this opinion, Mr. Pusey, who left for New York to-day, via Denver, shares. He considers that in the "Garonne" you have a very valuable asset.

A supply bill came in this afternoon, amounting to $1300, of which I had no knowledge before the steamer sailed yesterday, which raised the amount of the indebtedness for which we are short of funds, to a little over $13,000. You will understand, of course, that these bills must be promptly met. I, therefore, ask you to remit me the money by telegraph, upon receipt of this letter, which I calculate will be on the 9th or 10th inst.

During Capt. Ferguson's absence at least, and for your own future protection, I think it would be well for you to direct me to fill no requisitions for material or supplies for the "Garonne," unless I am satisfied that the same are absolutely necessary, and for you to instruct Mr. Hastings of Capt. Ferguson's office, that he must confer with me regarding all matters connected with the operation of this steamer and the expenses incident thereto. I am afraid that unless you do this, you will be apt to have further disappointments in the matter of expenditures. You may rest assured that I want to protect you in every way I can, but in order to do so, I should be placed in a position of absolute authority here, as far as you are concerned.

Please regard the latter portion of this letter as confidential, as I should be very unwilling to have your representatives here think that I was trying to "knock" them.

I sincerely hope that you will not embarrass me by failing to promptly remit, on receipt of this letter, enough money to pay all the bills.

Yours faithfully.

[Endorsed]: Exhibit "X." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Y."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, Wash., May 31, 1904.

Occidental Securities Company, 42 Broadway, New York.

W. will accept five thousand cash from New York at once and twenty-two thousand five hundred out of receipts, balance to be paid in thirty days, secured by mortgage, and note. Remit five thousand immediately. Very imperative and must close at once.

CHARLES B. SMITH

Special Rush.

[Endorsed]: Exhibit "Y." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Z."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 27, 1904.

Occidental Securities Company, 42 Broadway, New York.

Received five thousand yesterday account expenses. Will you remit ten thousand additional today, supplies. Requisitions must be filled immediately insure vessel sailing second.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "Z." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "A-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 26, 1904.

Occidental Securities Company, 42 Broadway, New York.

Your telegram yesterday unsatisfactory. Neither cargo, coal nor supplies will go aboard steamer until I receive money pay therefor. Have instructed attorneys delay further action until receipt your reply this message, which shall expect promptly.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "A-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "B-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 20, 1904.

Charles B. Smith and Occidental Securities Company, 42 Broadway, New York City.

Unless I receive at least five thousand here before noon to-morrow to partially protect me against bills due and expenses being incured on Garonne my account, shall turn matter over to my attorneys to take necessary steps to cancel sale. Am so situated that I have no alternative in matter. Earnestly hope you will protect yourselves by forwarding money in time.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "B-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "C-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 23, 1904.

C. B. Smith or Occidental Securities Co., 42 Broadway, New York.

Received twenty-five hundred from you Saturday. Same day advanced two thousand for you. Steamer

must coal next Wednesday, expense five thousand. Insurance must be placed this week, expense six thousand year's premium. Food supplies must be put aboard this week, expense six thousand. You now owe me money advanced five thousand. If balance purchase price paid immediately cash or satisfactory securities, you will be at liberty to contract all bills you desire Garonne's credit, and pay same out of freight and passenger receipts available June second. If purchase not completed immediately must have cash before can permit coal supplies and insurance to purchased steamer's credit. Please advise quickly what course you will pursue.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "C-1." Filed in the U. S. Circuit Court, Western District of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "D-1."

(On Blank of Postal Telegraph-Cable Company.)

May 23, 1904.

Chase National Bank, New York City.

Please telegraph financial standing General Grenville M. Dodge, New York City; would you consider notes for sixty thousand dollars endorsed by him safe collateral.

Garonne FRANK WATERHOUSE.

[Endorsed]: Exhibit "D-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "E-1."

(On Letterhead North-Alaska Steamship Company.)

New York, May 17, 1904.

Mr. Frank Waterhouse, Seattle, Wash.

Dear Sir: On May 13th, 1904, we sent you the following telegram, which we now confirm: "To insure your protection executed contract today General Grenville M. Dodge. Nature contract itself protects you. Consult Dunn and Bradstreet for Dodge rating Mailing particulars . Have paid five thousand more than terms of sale. Hoped to assist you and save discount. Still expect to do so if necessary satisfactory securities for deferred payments. Some money tomorrow."

The contract with Gen. Dodge is of such a nature that to protect himself he will in our opinion necessarily protect you. Other arrangements are made by which we will be able to pay you all or nearly all due.

If these are carried out we think you have no cause for anxiety as to our ability to meet or exceed your requirements as to deferred payments, and satisfactory securities.

In short, the interests of Gen. Dodge and the Steamship Company are mutual by this agreement, and whatever operates to hinder or delay the success of this Company will imperil the substantial interest that Gen. Dodge has acquired in our enterprise.

This letter is sent you by our Mr. Leake during the enforced absence of our President, who has been kept from transacting business by the illness of his mother.

Yours very truly,

N. A. S. S. CO.

J. B. LEAKE, Secy.

[Endorsed]: Exhibit "E-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "F-1."

(On Letterhead Chase National Bank.

New York, May 24, 1904.

Mr. Frank Waterhouse, Seattle, Wash.

Dear Sir: We have received your telegraphic inquiry of the 23d instant, and in response to your request for a reply by wire we have sent you the following message which is hereby confirmed:

> Your telegram even date received. Party inquired about in excellent standing here. Reported man considerable means.

General Dodge is a gentleman well advanced in years, and was formerly a banker and railroad official at Council Bluffs, Iowa, where we understood he still retains his home, but spends most of his time in New York. He was a member of Congress in 1869; was appointed by the President as a commissioner to inquire into the management of the war with Spain, and stands very high in military and government official circles. At the present time he is Chairman of the Board of Directors of the Colorado Southern Railway, and is a Director in the Fort Worth & Denver Railway, the Colorado Midland, and the Wichita Valley Railroad.

His local interests are the Bowling Green Trust Co. and the India Wharf Brewing Co. As intimated in our telegram, he is supposed to be possessed of considerable wealth and he is a gentleman of the highest character and business integrity.

Yours very truly,

E. J. STALKER,

Cashier.

[Endorsed]: Exhibit "F-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "G-1."

NORTH ALASKA STEAMSHIP COMPANY.

S. S. "Garonne."

Frank Waterhouse, Esq.

Dear Sir: Failing to see you at the dock I take this means to let you know that I have placed in the Purser's hands $800 which I took from the Traffic Mgrs. office. This was to enable the ship to meet labor charges before the collection of freight at Nome, and I propose to send you $200 at the same time as the $5000 is sent on the Dodge matter to cover the amounts used out of receipts heretofore.

Yours truly,

CHAS. B. SMITH.

[Endorsed]: Exhibit "G-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "H-1."

(On Blank of Postal Telegraph Commercial Cables.)

121 SF. BR. W. 12

New York, N. Y. May 26

Frank Waterhouse, Seattle.

All arrangements completed today wire five thousand ten tomorrow or Saturday sure.

J. B. LEAKE.

114p/m.

[Endorsed]: Exhibit "H-1." Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "I-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 26, 1904.

Occidental Securities Co., 42 Broadway, New York.

Your telegram yesterday unsatisfactory. Neither cargo, coal nor supplies will go aboard steamer until I receive money pay therefor. Have instructed attorneys delay further action until receipt of your reply to this message, which shall expect promptly.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "I-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "J-1."

(On Blank of Postal Telegraph Commercial Cables.)

191.VR.WA.S. 8.

New York, May 25th, 1904.

W. G. Bogle, Seattle, Wn.

Wired Waterhouse in full regarding telegrams of today.

CHARLES B. SMITH.

5:51 P. M.

[Endorsed]: Exhibit "J-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "K-1."

(On Blank of Postal Telegraph-Cable Company.)
186. VR. WA. S. 37.

New York, May 25th, 1904.

Frank Waterhouse, Seattle, Wn.

Distressing delay unavoidable in absence member syndicate payment sure. Our interests mutual. Do not jeopardize expect money pay coal tomorrow supplies this week insurance will be paid. Smith leaves tomorrow morning Seattle to complete contract see Boyle.

J. B. LEAKE.

5:40 P. M.

[Endorsed]: Exhibit "K-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "L-1."

(On Blank of Western Union Telegraph Company.)
123Ch.KD.U. 17 Collect

New York, May 24, 1904.

Frank Waterhouse, Seattle, Wn.

Your telegram of even date received Party inquired about in excellent standing here Reported man considerable means.

CHASE NATL. BANK.

1151 a. m.

[Endorsed]: Exhibit "L-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "M-1."

(On Blank of Postal Telegraph Commercial Cables.)
112 Vr Af Ne

New York, N. Y. May 23rd, 1904.

Frank Waterhouse, Seattle Wn.

Appreciate urgency making all effort Close arrangement pay you.

C. B. SMITH.

330pm.

[Endorsed]: Exhibit "M-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "N-1."

		Interest.
Purchase price S. S. Garonne.....	85000	
Remittance Feby. 3, 1000; Feby. 15, 14000	15000	
	70000	
Interest Feby 15 to Mch. 15 on 70000 at 7%		408.33
Remittance March 15.....	7000	
	63000	
Interest Mch. 15 to Mch. 18 on 63000 at 7%		36.75
Remittance March 18.....	3000	
	60000	
Interest Mch. 18 to Apl. 24 on 60000 at 7%		420.
Paid F. Waterhouse in New York apl. 24	5000	
	55000	
Interest April 24 to June 2 on 55000 at 7%		406.38
		1271.46

E. & O. E.

[Endorsed]: Exhibit "N-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "O-1."

(On Blank of Postal Telegraph-Cable Company.)

May 25, 1904. B.

Charles B. Smith, Occidental Securities Co., 42 Broadway, New York City.

Please accept notice Garonne will not be coaled, or supplies allowed aboard, or cargo now on wharf loaded, until receive money pay for same, or until you execute satisfactory securities covering all deferred payments and deposit same for me in Chase National Bank, or pay balance purchase price cash. Steamer should be loading now, due to coal tomorrow. Understand her cargo space all engaged, considerable number passengers booked. This is my final determination. Unless hear satisfactorily from you today, will turn matter over to my attorney for cancellation contract tonight.

(Garonne)

FRANK WATERHOUSE.

[Endorsed]: Exhibit "O-1. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "P-1."

(On Blank of Postal Telegraph Commercial Cables.)

142 Vr. N. R. 12,

New York, N. Y., May 19th, 1904.

Mr. Frank Waterhouse, Seattle, Wn.

Cannot force collection promised today urging to reciprocate your favors pay sure.

J. B. LEAKE.

5:05P

[Endorsed]: Exhibit "P-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Q-1."

(On Blank of Postal Telegraph Cable Company.)

May 17, 1904B?

C. B. Smith, Occidental Securities Co., New York City.

Received no money. Additional bills for work supplies ordered by Ferguson on Garonne's credit and account coming in. My patience being rapidly exhausted. You must remit ample funds immediately, or shall take necessary steps protect myself. Please consider this an ultimatum.

FRANK WATERHOUSE.

(Garonne)

[Endorsed]: Exhibit "Q-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "R-1."

(On Blank of Postal Telegraph Commercial Cables.)
129 Vr. N. R. 13

New York, N. Y., May 16th, 1904.

Frank Waterhouse, Seattle, Wn.

Expect Ferguson pay today can't tell explain Dodge by wire Trust best efforts.

C. B. SMITH.

4:15

[Endorsed]: Exhibit "R-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "S-1."

(On Blank of Postal Telegraph Cables.)
"93 Vr N Ne 20 3 ex

New York, May 14, 04.

Frank Waterhouse, Seattle.

Your wire disturbed assurance of money today re-

quiring effort to restore please favor us by continuing work.

O. C. S. CO.,
J. B. LEAKE.

132pm.

[Endorsed]: Exhibit "S-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "T-1."

(On Blank of Postal Telegraph-Cable Company.)
"221 SF. K. W. 56

New York, N. Y., May 13th.

Frank Waterhouse, Seattle.

To insure your protection executed contract today general greenville M. Dodge nature contract itself protects you consult Dunn and Bradstreet for Dodge rating mailing particulars have paid five thousand more than terms of sale hoped to assist you and save discount still expect to do so if necessary satisfactory securities for deferred payments some money tomorrow.

C. B. SMITH.

610pm

[Endorsed]: Exhibit "T-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "U-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 14, 1904.

Charles B. Smith, Occidental Securities Company, 42 Broadway, New York.

Your last telegram unsatisfactory. Do not understand nature contract Dodge, which protects me. I require five thousand cash Monday, for payment bills already incurred and satisfactory security for deferred purchase price payments. If you remit this Monday and five thousand additional on account purchase, to reach me not later than next Wednesday, also five thousand to reach me May twenty-fifth, I will extend date for delivery of securities or for making payment in full cash, until June fifth. Am willing accommodate you every way possible but there are limitations to my ability.

FRANK WATERHOUSE.

Rush.

[Endorsed]: Exhibit "U-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "V-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 13, 1904.

Charles B. Smith, Occidental Securities Company, 42 Broadway, New York.

No reply to my telegram of yesterday. Please take notice unless I receive three thousand today and two thousand additional next Monday, all work on Garonne will be discontinued tomorrow night; also unless I receive fifteen thousand next Monday, account of purchase price or the satisfactory securities covering deferred payments, sale will be declared cancelled and money already paid, forfeited.

FRANK WATERHOUSE.

Special Rush.

[Endorsed]: Exhibit "V-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "W-1."

(On Blank of Postal Telegraph-Cable Company.)

Charles B. Smith, Occidental Securities Company, 42 Broadway, New York.

Have received formal notice from Waterhouse today that unless he receives three thousand on account of expenses incurred today and two thousand addi-

tional on Monday for expenses incurred which will have to be paid that day, all work will be discontinued on steamer tomorrow evening. He also insists that he shall receive at least fifteen thousand by the fifteenth, on account of purchase price, or sale will be canceled and money already paid forfeited. Waterhouse evidently anxious accommodate us all he can, but unable to continue advancing money or extend payment of purchase unless above amount immediately forthcoming? Am satisfied he will adopt measured stated and the situation very serious one, requiring immediate attention. Strongly advise you attend to this immediately and communicate promptly with Waterhouse.

W. H. FERGUSON.

Special Rush.

[Endorsed]: Exhibit "W-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "X-1."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 12, 1904.

Occidental Surities Company, 42 Broadway, New York.

Yesterday's telegram unsatisfactory. Am anxious accommodate you, but large amount of work in progress on Garonne which I cannot and will not permit to continue on my account, unless I immediately receive funds to pay for same. Sincerely hope you will not compel me to have work stopped.

FRANK WATERHOUSE.

Rush.

[Endorsed]: Exhibit "X-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Y-1."

(On Blank of Postal Telegraph Commercial Cables.)
94 Vr. N.M.10.

New York, May 11, 1904.

Frank Waterhouse, Seattle.

Fully expect meet your wishes but can't demand conclusion today.

J. B. LEAKE.

5:44 p. m.

[Endorsed]: Exhibit "Y-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Z-1."

(On Blank of Postal Telegraph-Cable Company.)

May 11, 1904. B

Charles B. Smith, Occidental Securities Company,
42 Broadway, New York City.

Special Rush.

Cannot permit work Garonne proceed unless receive immediately necessary funds. Bills amounting approximately five thousand including drydock expenses, are here for payment and must be promptly met. Steamer is here, in splendid condition; will be entirely completed, ready for sea by June first, if necessary expense funds promptly received from you. Can I also absolutely depend on your taking up balance purchase price by May fifteenth, as promised; if not, what amount money can I depend on receiving account purchase price by that date? Please state exactly what I may expect, without any chance failure. To meet certain obligations of my own, need fifteen thousand dollars on thirteenth; can you arrange let me have this amount positively on that date? Please wire definite, positive reply to these questions, today.

FRANK WATERHOUSE.

Special Rush

Garonne.

[Endorsed]: Exhibit "Z-1." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "A-2."

Seattle, May 6, 1904.

Frank Waterhouse, Auditorium Annex, Chicago, Illinois.

Smith wires; Am arranging to carry out all promises to you including passed payments. Beg your co-operation by allowing Garonne dry docked today. Will positively meet the expense. (End quote" Please answer quickly so that we can advise Esquimalt and inspectors. Crew now on board Garonne.

FRANK WATERHOUSE & CO.

[Endorsed]: Exhibit "A-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "B-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, May 6, 1904.

Charles B. Smith, North Alaska Steamship Company, 42 Broadway, New York City.

Your wire to Waterhouse Auditorium Seattle repeated to him Auditorium Chicago.

FRANK WATERHOUSE & CO.

[Endorsed]: Exhibit "B-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "C-2."

(On Blank of Postal Telegraph Commercial Cables.)

"41 SF. WF. W. 26.

New York, N. Y., May 6

Frank Waterhouse, Auditorium, Seattle.

Am arranging to carry out all promises to you including passed payment beg your co-operation by allowing Garonne dry docked today will positively meet the expense.

10am.

C. B. SMITH.

[Endorsed]: Exhibit "C-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "D-2."

(On Blank of Postal Telegraph Commercial Cables.)
236. SF. MI. S. 13 Collect.

Chicago, May 4th, 1904.

Frank Waterhouse and Co., Seattle, Wn.

Keep promptly posted regarding movements of Garonne report remittances received New York.

FRANK WATERHOUSE.

7:44 P. M.

[Endorsed]: Exhibit "D-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "E-2."

(On Blank of Western Union Telegraph Company.)

Seattle, May 4, 1904.

Frank Waterhouse, Auditorium Annex, Chicago. Illinois.

Ferguson wiring New York be sure have thirty-five hundred here tomorrow. Will not move Garonne until received.

FRANK WATERHOUSE & CO.

[Endorsed]: Exhibit "E-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "F-2."

(On Blank of Western Union Telegraph Company.)

"NX" Chicago May '04.

Frank Waterhouse & Co., Seattle, Wn.

Will Tremont have complete cargo Dont permit Garonne proceed Esquimalt until you receive Minimum thirty-five hundred additional expenses.

FRANK WATERHOUSE.

Garonne.

[Endorsed]: Exhibit "F-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "G-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York Apl. 28 '04.

Frank Waterhouse & Co., Seattle, Wn.

Is draft paid wire Boody House Toledo where will Rosene Dock.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "G-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "H-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York Apl. 27 '04.

Frank Waterhouse & Co., Seattle, Wn.

Leave Thursday evening for Toledo address Boody House draft be paid tomorrow.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "H-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "I-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, April 26, 1904.

Frank Waterhouse, Hotel Spaulding, New York City.

New York bank advises smith draft protested today but that Smith promises payment tomorrow.

FRANK WATERHOUSE & CO.

[Endorsed]: Exhibit "I-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "J-2."

(On Letterhead of The Chase National Bank.)

April 28th, 1904.

Frank Waterhouse, Esq., President Frank Waterhouse & Co., Incorporated, Seattle, Wash.

Dear Sir: We beg to advise that Mr. McGinnis of Speyer & Co. has today handed to us a bill of sale of registered vessel, Frank Waterhouse, Incorporated, to North Alaska Steamship Co., Steamship called the Garonne, which bill we hold subject to your instructions.

Yours very truly,

S. H. MILLER,
Assistant Cashier.

[Endorsed]: Exhibit "J-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "K-2."

April 8, 1904.

Mr. Charles B. Smith, c/o Rowe Alaska Mining Company, Room 409, #20 Broad St., New York City.

Dear Sir: In accordance with your telegraphic authority of April 7th, we have this day made ten days

sight draft on you for $5,000.00 account "Garonne" repairs, which we trust to your kind protection.

Yours truly,

Treas.

[Endorsed]: Exhibit "K-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "L-2."

THE NATIONAL CITY BANK.

New York, April 6, 1904.

E. Foster Kelley, Esq., Cashier, Seattle National Bank, Seattle, Wash.

Dear Sir: We have sent you night message in response to your telegram of this morning, as follows: "Company in question in state formation. Present financial responsibility very small. Letter follows," which we now beg to confirm, and to state that the information we receive is to the effect that while the Company in question is incorporated for $3,000,000, the shares of par value $10., we find from an interview with Mr. L. that they have only sold a very small portion of their stock; that a payment has been made on a boat of $25,000, partially made up by sale of stock, and the rest by contributions of several of the organizers. It is not through that any of these

people are very strong financially, and it would be as well to have transactions for the present well secured.

Trusting the above will be of service to you,

we, Yours very truly,

(Sgnd) A. G. LOOMIS,

Vice-President.

[Endorsed]: Exhibit "L-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "M-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York, N. Y. April 7th, 1904.

Frank Waterhouse, Seattle, Wn.

I pay your draft five thousand dollars ten days sight.

C. B. SMITH.

[Endorsed]: Exhibit "M-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "N-2."

(On Blank of the Postal Telegraph-Cable Company.)

Seattle, April 6, 1904.

Charles B. Smith, Room 409; 20 Broad Street, New York City.

Received telegram yesterday from Occidental Securities Company authorizing draft on them for five thousand dollars. Presume this your account. Not knowing Securities Company, will not draw unless am guaranteed draft will be paid. Please arrange with New York Bank to telegraph correspondent here to honor my draft on Securities Company or on you for five thousand at ten days sight. Cannot continue work on steamer unless placed in funds immediately. Continuance work imperative enable completion work before season opens. Wire prompt rely.

Rush.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "N-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "O-2."

(On Blank of Western Union Telegraph Company.)

Z. New York, April 5, 1904.

Frank Waterhouse, Burke Bldg., Seattle, Wn.

Will pay you draft five thousand ten days sight.

OCCIDENTAL SECURITIES CO.,
J. B. LEAKE,
Treas.

[Endorsed]: Exhibit "O-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "P-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, April 5, 1904.

Charles B. Smith, North Alaska Steamship Company, Room 409, #20 Broad Street, New York City.

Wire Waterhouse direct to draw five thousand ten days sight to cover expenditures Garonne. Rush answer.

W. H. FERGUSON.

Rush—Charge Garonne.

[Endorsed]: Exhibit "P-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Q-2."

(On Blank of Postal Telegraph Commercial Cable.)

Frank Waterhouse, Burke Bldg., Seattle.

Expenses on boat will be met undetermined whether to go to Seattle or wait for you here will wire definitely Monday.

CHAS. B. SMITH.

[Endorsed]: Exhibit "Q-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "R-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, Wash., March 31, 1904.

Charles B. Smith, Care Rowe Alaska Mining Co., 20 Broad St., New York City.

Please telegraph reply to my message March twenty ninth. Shall be compelled to discontinue work now proceeding on steamer unless you arrange immediately to pay for same.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "R-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "S-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, March 29, 1904.

Charles B. Smith, Care Rowe Alaska Mining Co., 20 Broad Street, New York City.

Had arranged start east next Saturday. Expected be New York April seventh. Cannot matter be fully closed on my arrival there. If not please wire positive date you will be here. Please remit by telegraph thirty-five hundred dollars to pay for work already done on steamer by Fergusons orders and for insurance premium advanced by me.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "S-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "T-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York N. Y. March 29th, 1904.

Frank Waterhouse, Burke Building, Seattle, Wn.

Delay caused having nothing here showing equity

in ship will be in Seattle next week arrange fully with you.

CHARLES B. SMITH.

[Endorsed]: Exhibit "T-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "U-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, March 28th, 1904.

Charles B. Smith, Care Rowe Alaska Mining Co., 20 Broad Street, New York City.

I have advanced thirty-five hundred dollars to pay insurance premiums for work on Garonne on your account since you purchased her, on Ferguson's promise that you would remit enough money to reimburse me and take care of future necessary expenses. Please wire definitely when I shall receive the money already advanced and be placed in funds to continue the work; also wire if you will be prepared to complete purchase of steamer May fifteenth as agreed.

Special rush message.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "U-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "V-2."

Seattle, Wash. March 15, 1904.B

Received from the Washington National Bank of Seattle, Cashier's Check Puget Sound National Bank of Seattle, payable to John J. Habecker, and endorsed "Pay to order of Frank Waterhouse No. 107996, for Three Hundred dollars."

[Endorsed]: Exhibit "V-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "W-2."

(On Blank of Postal Telegraph-Cable Company.)

February 16, 1904.B

W. H. Ferguson, Fifth Avenue Hotel, New York City.

I received and receipted to Hastings for fourteen thousand dollars account purchase Garonne yesterday.

[Endorsed]: Exhibit "W-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "X-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York, Feb. 16, 1904.

Frank Waterhouse, Bierk Bldg., Seattle.

Will leave for Seattle Wednesday Hastings has instructions regards sale or charter will arrange details on my arrival.

U. H. FERGUSON.

[Endorsed]: Exhibit "X-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Y-2."

(On Blank of Postal Telegraph Commercial Cables.)

New York, Feb. 15th, 1904.

Frank Waterhouse, Burke Bldg., Seattle, Wn.

Fourteen thousand dollars deposited Chase National. Wire to Washington National Seattle to pay you on account of purchase Garonne please wire acceptance.

W. H. FERGUSON.

[Endorsed]: Exhibit "Y-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Z-2."

(On Blank of Postal Telegraph-Cable Company.)

Seattle, Feb. 12, 1904. B.

W. H. Ferguson, Fifth Avenue Hotel, New York City.

Has Washington National Bank Seattle been instructed honor my draft fourteen thousand dollars next Monday?

FRANK WATERHOUSE.

Pink.

[Endorsed]: Exhibit "Z-2." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "A-3."

February 10, 1904.

W. H. Ferguson, Fifth Avenue Hotel, New York, N. Y.

Received your letter fifth. A vital condition of sale Garonne to you was that purchase should be entirely completed by February fifteenth by exchange of steamer for fifteen thousand cash, notes, mortgage bond and other satisfactory collateral. Am willing accept fourteen thousand next Monday, provided you agree execute notes, mortgage bond and

deliver securities by March first, or forfeit the fifteen thousand if you fail; but I want you to advise by wire what character of collateral to deferred payments you will furnish in addition to mortgage and bond, so I may pass upon same by Monday. I guarantee Garonne good insurable risk, and will pass United States inspection for commission, by expenditure on your part of about seventy-five hundred dollars. Am now doing considerable work on her my own expense, preparatory to inspection. Other parties anxious to purchase her next Monday at same price for practically cash.

FRANK WATERHOUSE.

Rush.

[Endorsed]: Exhibit "A-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "B-3."

Received, Seattle, February 15, 1904, of C. B. Smith, Fourteen Thousand Dollars, being payment due this pay on contract for purchase of Steamship "Garonne." Another payment of $10,00.00 and the execution of notes, mortgage, bond and collaterals for deferred payments are to be made and completed on or before March 15, 1904, as per terms of contract; and if default is made by said Smith

in making said further payment or in execution of said securities on or before March 15th next, then his right to purchase said vessel shall ceases, and all moneys paid by him toward such purchase shall be forfeited to and be and remain the moneys of this Company.

FRANK WATERHOUSE & CO., Inc.,
By FRANK WATERHOUSE,
President.

[Endorsed]: Exhibit "B-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "C-3."

(On Blank of Western Union Telegraph Company.)

2, New York, Feb. 15, '04.

F. Waterhouse, Burke Bldg., Seattle, Wn.

Fourteen thousand wired by Chase National to Washington National Seattle to Pay you account Garonne please wire acceptance will pay you insurance and expenses on arrival Seattle next Monday.

W. H. FERGUSON.

[Endorsed]: Exhibit "C-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "D-3."

(On Blank of Western Union Telegraph Company.)

Q. New York, Feb. 15, 1904.

Frank Waterhouse, Burke Bldg., Seattle, Wn.

C. B. Smith, has deposited fourteen thousand dollars same transferred by wire through Washington National Bank, Seattle.

[Endorsed]: Exhibit "D-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "E-3."

(On Blank of Western-Union Telegraph Company.)

New York, February 11:04.

Frank Waterhouse, Burke Bldg., Seattle, Washn.

Understand Garonne transfer on payment twenty-five thousand my principal understands same and has gone south cannot reach Seattle until March tenth or twelfth. We propose pay fourteen thousand Feby. fifteenth, ten thousand March fifteenth made then Notes for balance mortgage insurance policy good security bonds or cash I may not reach Seattle until March fifth Will pay shipkeeper until transfer.

W. H. FERGUSON,

[Endorsed]: Exhibit "E-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "F-3."

New York, Feb. 5th, 1904.

Mr. Frank Waterhouse, Burke Building, Seattle, Wash.

Dear Sir: Your various communications, including confirmation of the sale of the Steamer Garonne duly received and we have confirmed a compliance with the terms by telegraph.

We have written our Mr. Hastings to make a thorough inspection of the Steamer and wire us the results of the said inspection.

I expect to be in Seattle myself in time to go over the ship and follow the lines of inspection, but it is just possible that I may not arrive there in time, and may be detained here a week or 10 days longer than I anticipate.

In regard to the second payment on the Garonne, we will follow this mode which we trust will be satisfactory. On or before Feb. 15th, we will deposit in the Chase National Bank of New York, $14,000, and the bank will wire the Washington National Bank of Seattle to pay your draft for this 14,000 on account of the purchase price, of the steamer "Garonne." We will also notify you at the same

time that we have paid money in your credit and a receipt given by you to our Mr. Hastings will cover the ground.

As soon as I arrive in Seattle we will finish up the matter as the details as per arrangement so as to make the transfer of the vessel on the next payment of 10,000. We would like to have the option until June 1st of paying the full amount of $75,000 in cash for the said steamer. This I feel sure you will allow us as it is practically a cash transaction by that time.

Yours very truly,

W. H. FERGUSON.

[Endorsed]: Exhibit "F-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "G-3."

(On Blank of Western-Union Telegraph Company.)

"MS." New York, Feb. 4 '04.

Frank Waterhouse, Burke Bldg., Seattle, Wn.

Confirmation sale GARONNE received conditions will be complied with.

U. H. FERGUSON.

[Endorsed]: Exhibit "G-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "H-3."

(On Blank of Postal Telegraph-Cable Company.)

New York, Feb. 3, 1904.

Frank Waterhouse, Burke Building, Seattle.

Proposition Garrone accepted Chase National bank has wired Washington National bank, Seattle, to pay you one thousand dollars close deal will reach Seattle, Feby. 12th.

U. H. FERGUSON.

[Endorsed]: Exhibit "H-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "I-3."

(On Blank of Postal Telegraph-Cable Company.)

Philadelphia, Pa., Feb. 2nd, '1904.

Frank Waterhouse, Burke Building, Seattle, Wn.

Terms Garrona received commission satisfactory New York to-night Fifth Ave. Hotel require twenty-four hours.

W. H. FERGUSON.

[Endorsed]: Exhibit "I-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "J-3."

AT A SPECIAL MEETING OF THE

BOARD OF DIRECTORS

OF

THE NORTH ALASKA STEAMSHIP COMPANY.

Held at 42 Broadway, New York, July 9, 1904, the following Resolution was adopted,

Moved by Mr. Forff, Seconded by Mr. Segee,

Whereas, this company is indebted to Frank Waterhouse & Company of Seattle, Washington, in the sum of approximately Seventy Thousand Dollars, and

Whereas, the said Frank Waterhouse & Company has received large sums of money, from this Company, and

Whereas, it seems wise to this Board of Directors, and beneficial to the company's interests that the mutual claim between this company and Frank Waterhouse & Company be compromised and settled by the exchange of releases.

Be it Resolved, that the attorneys of the company be and they hereby are authorized to prepare, and have executed by the offices of this company, proper documents to carry out the same, and to receive from the said Frank Waterhouse & Company, documents properly executed to carry out said plan, and the Secretary of this Company is authorized to affix the company's seal to documents executed in accordance herewith."

[Endorsed]: Exhibit "J-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "K-3."

Copy.

At a special meeting of the North Alaska Steamship Company held July 8, 1904, the following resolution was adopted.

"Resolved that the Counsel of this Company notify Mr. Waterhouse that the Company cannot meet the terms of the contract for the purchase of the Steamship Garonne, and that Counsel confer with Mr. Waterhouse with full authority from this Board to take any steps necessary to protect the Company's interest.

NORTH ALASKA STEAMSHIP CO.,
JOHN B. LEAKE,
Secy.

[Endorsed]: Exhibit "K-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "L-3."

New York, July 8th, 1904.

North Alaska Steamship Company.

Gentlemen: By terms of our conditional contract of sale of the Steamship "Garonne" to you it was provided that deferred payments should be evidenced by notes of your company and secured by a first mortgage on the steamer and by such additional collateral security as should be satisfactory to us. It was also further provided that your company should give us a Guaranty Company's bond, protecting us and the steamer from any lien or claims for supplies or repairs that might be incurred by you at any time before the payment of our debt in full. It was also provided in said agreement that these securities and bonds were to be furnished to us on or before the tenth day of March, 1904. None of these conditions have been complied with by you.

There is now a balance due us of $37,641, with interest, since June 2d, 1904, and there are claims and demands outstanding against the steamer, incurred by you in the purchase of supplies and material for repairs, amounting to something over $30,000 which

are unpaid and for which the holders claim a lien against the steamer.

We now notify you that unless you are prepared to and will at once complete the performance of your contract by accepting the title to the steamer, executing a mortgage and notes for the deferred payments, furnish the bond from the Guaranty Company, indemnifying us against any claims against the steamer, and furnish the additional collateral security for preferred payments due us, that security to be to our satisfaction, we will exercise the right reserved to us under the contract of canceling your option of purchasing the said steamer and declare a forfeiture of any rights you would otherwise have in said contract, and also will retain the payments heretofore made to us thereon.

We are now and have been since the tenth day of March last, ready and prepared to execute a bill of sale to you of the steamer upon your compliance with the terms of said contract, but we are not willing to allow the matter to stand open in its present shape, and we require that you either perform the contract or submit to a forfeiture of your rights under it at once.

Yours truly,

(Signed) FRANK WATERHOUSE & CO.

[Endorsed]: Exhibit "L-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun.

16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "M-3."

(On Letterhead North-Alaska Steamship Company.)

New York, June 9, 1904.

Mr. Frank Waterhouse, Holland House, New York.

Dear Sirs: You are hereby notified that the North Alaska Steamship Company refuses to comply with the terms of the contract for the purchase of the Steamship Garonne existing between yourself, Frank Waterhouse & Co., Inc., and the North Alaska Steamship Company.

You are further notified that the North Alaska Steamship Company claims a lien upon the Steamship Garonne to the amount of all payments made by the North Alaska Steamship Company or for its benefit, whether upon the purchase price or otherwise.

Very truly yours,

NORTH ALASKA STEAMSHIP CO.,

J. B. LEAKE, Secy.

[Endorsed]: Exhibit "M-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "N-3."

Seattle, Aug. 2, 1904.

Copy.

F. S. Pusey, Esq., 101 Broadway, New York.

Dear Sir: I duly received your telegram of the 15th ult., reading as follows:

"Have you advised of collection of trustee freight money? Just returned yesterday. Please wire present status of our joint claims.

(Sgd.) FRANK S. PUSEY."

This was not replied to, for the sole reason that I was not in possession of your address, and had no means of knowing where a telegram would reach you, and it was only through your letter of July 27th, which reached me yesterday, that I learned of your address.

I must confess to a feeling of surprise and annoyance at the tone of your above-mentioned letter, for the reason that it was specifically understood and put in writing, that I was to be in no way personally responsible to you, for the collection of your debt against the North Alaska Steamship Co. I agreed to act in the capacity of trustee, solely as a matter of accommodation to you, and in that capacity to receive and remit to you, the money which the officers of the North Alaska S. S. Co. promised to

remit to you from Cape Nome, and to pay to you, out of the revenues of their company thereafter. This was the only duty that I undertook, in my capacity as trustee. The money has not been remitted to me from Cape Nome, therefore I have had no opportunity to receive it or forward it to you. The North Alaska Steamship Company became defunct, and has retired from business. In the settlement of my own affairs with the company, I was obliged to take back the s s "Garonne," and assume an indebtedness which the North Alaska S. S. Co. had loaded her with, amounting to almost $35,000. I took the steamer back and assumed the indebtedness, and subsequently sold her to another corporation. I have no opportunity for protecting your claim. When I was in New York, I was informed that both yourself and General Dodge were out of the city. An effort to get into communication with you was made several times while I was there. I have no idea what disposition was made of the funds that were to be collected by Mr. Smith at Cape Nome, as I have received no advice from either him or from Capt. Ferguson, regarding the same. The settlement I was obliged to make with the North Alaska S. S. Co. was very unsatisfactory to me.

I enclose herewith notes and other papers, which I have been holding in this connection, for you. I re-

gret very much that I have been unable to collect this money for you, but the circumstances have been as above.

Kindly acknowledge receipt of enclosures.

Very truly yours,

(sgd) FRANK WATERHOUSE.

Enc.

[Endorsed]: Exhibit "N-3." Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "O-3."

Seattle, Feb. 1, 1904.

Copy.

W. Ferguson, Philadelphia.

Price Garonne $85,000; will pay you commission 2½%. Other parties in close negotiations on same terms; steamer will be sold to first comer.

FRANK WATERHOUSE.

Seattle, Feb. 3, 1904.

W. H. Ferguson, New York.

Your $1,000 received and accepted, and I now confirm sale Garonne, provided you pay me $14,000 Feb. 15, deferred payments to be made as follows: $10,000 March 10; $10,000 June 15; $5,000 Sept. 15,

$5,000 Nov. 15; all this year; $5,000 Feb. 15; $5,000 Apr. 15; $5,000 June 15; $5,000 Aug. 15; $5,000 Oct. 15; $10,000 Dec. 15; all 1905; $5,000 Mar. 15, 1906. Deferred payments to be secured by first mortgage on steamer, assignment marine insurance, corporation bond guaranteeing vessel against indebtedness, and other security which shall be satisfactory to me. Sale conditioned on terms and representations my letter to you Jan. 26th. Confirm this understanding.

FRANK WATERHOUSE.

Seattle, Feb. 10, 1904.

W. H. Ferguson, New York City.

Received your letter 5th; a vital condition sale Garonne to you was that sale should be entirely completed by Feb. 15th, by exchange of steamer for $15,000 cash, notes, mortgage bond and other satisfactory collateral. Am willing accept $14,000 next Monday, provided you agree execute notes, mortgage bond, and deliver securities by March 1st, or forfeit the $15,000 if you fail; but I want you to advise by wire what character of collateral to deferred payments you will furnish, in addition to mortgage and bond, so I may pass upon same by Monday. I guarantee Garonne good insurable risk and will pass U. S. inspection for commission, by expenditure on your part of about $25,000. Am now doing considerable work on her my own expense, preparatory to

inspection. Other parties anxious purchase her next Monday at same price, for practically cash.

FRANK WATERHOUSE.

Seattle, Feb. 12, 1904.

W. H. Ferguson, New York City.

Has Washington National Bank, Seattle, been instructed honor my draft $14,000 next Monday.

FRANK WATERHOUSE.

Seattle, Feb. 16, 1904.

W. H. Ferguson, New York City.

I received and receipted to Hastings for $14,000, account purchase Garonne yesterday.

Seattle, Mar. 28, 1904.

C. B. Smith, New York City.

I have advanced $3,500 to pay insurance premiums and for work on Garonne on your account since you purchased her on Ferguson's promise you would remit enough money to reimburse me and take care future necessary expenses. Please wire definitely when I shall receive the money already advanced and be placed in funds to continue the work. Also wire if you are prepared complete purchase of steamer.

FRANK WATERHOUSE.

Seattle, Mar. 28, 1904.

C. B. Smith, New York City.

Had arranged start east next Saturday; expected be New York April 7th. Cannot matter be fully

closed on my arrival there. If not please wire positive date you will be here, please remit by telegraph $3,500 to pay for work already done on steamer by Fergusons order and for insurance premium advanced by me.

FRANK WATERHOUSE.

Seattle, Mar. 31, 1904.

C. B. Smith, New York City.

Please telegraph reply message 29th. Shall be compelled discontinue work now proceeding on steamer unless you arrange immediately to pay for same.

FRANK WATERHOUSE.

Seattle, Apr. 5, 1904.

C. B. Smith, New York City.

Wire Waterhouse direct to draw five thousand ten days sight to cover expenditures Garonne. Rush answer.

W. H. FERGUSON.

Seattle, Apr. 6, 1904.

C. B. Smith, New York.

Received telegram yesterday from Occidental Securities Co. authorizing draft on them for $5,000. Presume this your account. Not knowing Securities company will not draw unless am guaranteed draft will be paid. Please arrange with New York Bank to telegraph correspondent here to honor my draft on Securities company or on you for five thousand at

ten days sight. Cannot continue work on steamer unless placed in funds.

Seattle, May 11, 1904.

C. B. Smith, New York City.

Cannot permit work Garonne proceed unless received immediately necessary funds. Bills amounting approximately $5,000 including drydock expenses are here for payment and must be promptly met. Steamer is here, in splendid condition, will be entirely completed, ready for sea by June first, if necessary expense funds promptly received from you. Can I also absolutely depend on your taking up balance purchase price by May 15th as promised. If not, what amount money can I depend on receiving account purchase price by that date. Please state exactly what I may expect, without any chance failure. To meet certain obligations of my own, need $15,000 on 13th can you arrange let me have this amount positively on that date? Please wire positive reply to these questions today.

FRANK WATERHOUSE.

Seattle, May 12, 1904.

Occidental Securities Company, New York.

Yesterday's telegram unsatisfactory. Am anxious accommodate you but large amount work in progress on Garonne which cannot and will not permit to continue on my account, unless I immediately receive

funds to pay for same. Sincerely hope you will not compel me to have work suspended.

FRANK WATERHOUSE.

Seattle, May 13, 1903.

C. B. Smith, New York City.

Have received formal notice from Waterhouse today that unless he received 3000 on account of expenses already incurred, today, and 2000 additional on Monday, for expenses incurred which will have to be paid that day, all work will be discontinued on steamer tomorrow evening. He also insists that he shall receive $15,000 at least, by the 15th on account of purchase price, or sale will be cancelled and money already paid forfeited. Waterhouse evidently anxious accommodate us all he can, but unable to continue advancing money or extend payment of purchase, unless above amount immediately forthcoming. Am satisfied will adopt measures stated and the situation very serious one, require immediate attention. Strongly advise you attend to this immediately and communicate promptly with Waterhouse.

W. H. FERGUSON.

Seattle, May 13, 1904.

Charles B. Smith, New York.

No reply my telegram of yesterday. Please take notice unless I receive $3000 today and $2000 additional Next Monday all work on Garonne will be

discontinued tomorrow night also unless I receive $15,000 next Monday, on account of purchase price, or the satisfactory securities covering deferred payments sale will be declared cancelled and money already paid forfeited.

FRANK WATERHOUSE.

Seattle, May 17, 1904.

C. B. Smith, New York.

Received no money. Additional bills for work, supplies ordered by Ferguson on Garonne's credit and account, coming in. My patience being rapidly exhausted. You must remit ample funds immediately or shall take necessary steps protect myself. Please consider this an ultimatum.

FRANK WATERHOUSE.

Seattle, May 20, 1905.

C. Smith, New York.

Unless I receive at least 5000 here by tomorrow noon, to partially protect me against bills due and expenses incurred on account of Garonne my account, shall turn matter over to my attorneys, to take necessary steps to cancel sale. Am so situated that I have no alternative in matter. Earnestly hope you will protect yourself, by forwarding money in time.

FRANK WATERHOUSE.

Seattle, May 23, 1904.

C. B. Smith, New York.

Received 2500 from you Saturday. Same day advanced 2000 for you, steamer must coal next Wednesday, expense $5000. Insurance must be placed this week, expense $6000, year premium. Food supplies must be put aboard this week, expense 6000. You now owe me money advanced $5000. If balance purchase price paid immediately cash, or satisfactory securities, you will be at liberty contract all bills you desire Garonne's credit, and pay same out of freight and passenger receipts available June 2. If purchase not completed immediately, must have cash before can permit coal supplies and insurance be purchased steamer's credit. Please advise quickly what course you will pursue.

FRANK WATERHOUSE.

Seattle, May 26, 1904.

Occidental Securities Co., New York City.

Your telegram yesterday unsatisfactory. Neither cargo, coal nor supplies will go aboard steamer until I receive money pay therefor. Have instructed attorneys delay further action until receipt your reply this message, which shall expect promptly.

FRANK WATERHOUSE.

Seattle, May 27, 1905.

Occidental Securities Co., New York.

Received $5000 yesterday account expenses. Will you remit $10,000 additional today, supplies: Requisitions must be filled immediately insure vessel sailing second.

FRANK WATERHOUSE.

Seattle, May 21, 1905.

Occidental S. Co., New York.

We will accept $5,000 cash from N. Y. at once, and $22,500 out of receipts, balance to be paid in 30 days, secured by mortgage and note. Remit $5,000 immediately? Very imperative and must close at once.

FRANK WATERHOUSE.

Seattle, June 10, 1904.

J. B. Leake, N. Y.

Have you executed mortgage and remitted money pay expense, bills here. These matters pressing, require immediate attention. Answer.

FRANK WATERHOUSE.

Seattle, June 11, 1904.

J. B. Leake, N. Y.

Underwriters demand immediate payment Garonne insurance amounting to 6600. They decline to issue covering notes and threaten cancel insurance, unless premiums paid immediately. Smith Ferguson assured me money for this purpose would be

remitted from N. Y. immediately after ship sailed. Must be telegraphed reach me by Monday without fail. Answer.

FRANK WATERHOUSE.

Seattle, June 13, 1904.

J. B. Leake, N. Y.

If you remit 13,000 to-morrow for expenses, execute mortgage at Chase National immediately and pay me eight thousand, six hundred, June 22, I will extend balance of payments as follows: $10,000 with interest on first note until July 12th; entire amount of second note until Aug. 15. Answer.

FRANK WATERHOUSE.

Seattle, May 14, 1904.

C. B. Smith, N. Y.

Your last telegram unsatisfactory. Do not understand nature contract Dodge, which protects me. I require 5000 cash Monday for payment bills already incurred, and satisfactory security for deferred purchase payments. If you remit this Monday and 5000 additional account purchase, to reach me not later than next Wednesday, also 5000 to reach me May 25th, I will extend date for delivery of securities, or for making payment in full in cash, until June 5th. Am willing accommodate you every possible way, but there are limitations to my ability.

Seattle, June 14, 1904.

W. H. Rowe, N. Y.

Will not let conditions remain as at present. Insist debts against Garonne now due, be paid immediately, and mortgage be executed immediately. Will expect prompt reply stating definitely what you intend to do.

FRANK WATERHOUSE.

Seattle, July 7, 1905.

Frank Waterhouse, N. Y.

900 only received from Nome. Chapin not received Pusey money. This week's pay-roll 560, next week 330, including Captain Lawe, steward, purser half pay—

Seattle, July 16, 1904.

C. S. Meade, N. Y.

Your wire date. Money received. Forward quickly original bills you took east against steamer. Bill sale will be forwarded Monday. Does suggested name steamship company stand.

Seattle, June 13, 1904.

J. B. Leake, New York City.

If you remit thirteen thousand to-morrow for expenses, execute mortgage at Chase National immediately and pay me eight thousand six hundred, June 22d, I will extend balance of payments as follows: Ten thousand with interest on first note until July

12th; entire amount of second note until August 15th. Answer.

FRANK WATERHOUSE.

Seattle, June 13, 1904.

J. B. Leake, New York City.

Thirteen thousand does not include insurance. Hastings promises furnish his statement, which is necessary complete mine, by Wednesday; will then forward mine promptly.

FRANK WATERHOUSE.

Seattle, June 14, 1904.

W. H. Rowe, New York City.

Will not let conditions remain as at present. Insist debts against Garonne, now due, be paid immediately, and mortgage be executed immediately. Will expect prompt reply, stating definitely what you intend to do.

FRANK WATERHOUSE.

Seattle, June 15, 1904.

W. H. Rowe, New York City.

When your telegram arrived yesterday was out of town. Message repeated over telephone and misunderstood. Certainly agree let conditions my telegram 13th stand until arrival. Mean early next week. Strongly advise you remit money promptly pay debts now due protect your own credit, save me embarrassment. If you will remit six thousand ex-

penses by to-morrow will stand off balance bills until next week.

FRANK WATERHOUSE.

[Endorsed]: Exhibit "O-3." Filed in the U. S. Circuit Court. Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "P-3."

THE UNITED STATES OF AMERICA.

BILL OF SALE OF REGISTERED VESSEL.

To All to Whom These Presents Shall Come, Greeting:

Know ye, that the Frank Waterhouse & Co., inc., a corporation, organized under the laws of the State of Washington, by Frank Waterhouse, its president, sole owner of the Str. or vessel, called the Garonne of Seattle, Wash., of the burden of twenty-three hundred and nineteen tons or thereabouts, for and in consideration of the sum of one dollar and other good and valuable consideration, lawful money of the United States of America, to it in hand paid, before the sealing and delivery of these presents, by the North Alaska Steamship Company, a corporation, organized under the laws of the State of New York, the receipt whereof it does hereby acknowl-

edge and is therewith satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said North Alaska Steamship Company, its successors and assigns, all of the said Str. or vessel, together with the masts, bowsprit, sails, boats, anchors, cable, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the certificate of the registry of which said steamer or vessel is as follows, viz.:

Register No. 108.	Official Number.
Numerals.	Letters.
86504	K. P. T. V. V.

CERTIFICATE OF REGISTRY.

In pursuance of Chapter I, Title XLVIII, 'Regulation of Commerce and Navigation,' Revised Statutes of the United States, W. P. Prichard, Secy. of Frank Waterhouse & Co., Inc., having taken and subscribed the oath required by law, and having sworn that he, Frank Waterhouse & Co., Inc., is the only owner of the vessel called the Garonne of Seattle, Wash., whereof R. McFarland is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1871, at Gooan, Scotland, as appears by R. R. 48B issued at Seattle, Wash., May 12, 1900, surrendered O. C. and said register having certified that the said vessel has four decks, and three masts; and that her length is 371

feet and — tenths; her breadth 41 feet and 4 tenths; her depth 20 feet and 4 tenths; her height 15 feet and 8 tenths; that she measures twenty-three hundred and nineteen tons, viz.:

	Tons.	100ths.
Capacity under tonnage deck.....	1938	19
Capacity between decks above tonnage deck	1962	93
Capacity of inclosures on upper deck, viz.....	44	54
Gross Tonnage....	3945	
Deductions under Section 4153, Revised Statutes, as amended by Act of March 2, 1905; Crew space 233.79; Master's cabin ..	233.79	
Steering gear, ——; Anchor gear, 46.62	117.74	
Boatswain's stores —; Chart-House ——; Storage of sails 12.03..	12.03	
Donkey engine and boiler, ——; Propelling power 1262.61..	1626.17	1626 17
Net Tonnage.....	2319	

The following described spaces, and no others, have been omitted, viz: ——— and that she is a str., has

a figure-head and a elliptic stern; and the said ——— having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at the Port of Port Townsend.

Given under my hand and seal at the Port of Port Townsend, this 4th day of May, in the year one thousand nine hundred and one (1901).

F. D. HEUSTIS, [Seal]
Collector of Customs.

No. ———(Seal)
Naval Officer.

EUGENE TYLER CHAMBERLAIN,
Commissioner of Navigation."

[Seal of United States Treasury.]

To have and to hold the said said Str. Garonne and appurtenances thereunto belonging unto the said North Alaska Steamship Company, its successors and assigns, to the sole and only proper use, benefit and behoof of the said North Alaska Steamship Company, its successors and assigns forever; and the said Frank Waterhouse & Co., Inc., has promised, covenanted, and agreed, and by these presents does promise, covenant, and agree, for itself, its successors and assigns, to and with the said North Alaska Steamship Company, its successors and assigns to warrant and defend the said title to said

Str. or vessel, and all the other before-mentioned appurtenances, against all and every person and persons whomsoever.

In testimony whereof, the said Frank Waterhouse & Co., Inc., has caused these presents to be signed by Frank Waterhouse, its president, and its corporate seal hereunto set this 8th day of April, in the year of our Lord one thousand nine hundred and four.

FRANK WATERHOUSE & CO., Inc. [Seal]
By FRANK WATERHOUSE, President.
Attest:

W. H. BOGLE,
Secretary.

State of Washington,
County of King,—ss.

I, Frank P. Dow, a notary public in and for the State of Washington, residing at Seattle, Wash., in the above-named county and State, duly commissioned, sworn and qualified, do hereby certify that on this —— day of ————, A. D., 190—, before me personally appeared Frank Waterhouse and W. H. Bogle, to me known to be the individuals who as President and Secretary, respectively, of Frank Waterhouse & Co., Inc., the corporation that executed the within instrument, and acknowledged the said instrument to be the free and voluntary act and

deed of the said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal this 8th day of April, 1904.

[Notarial Seal] FRANK P. DOW.

[Endorsed on back]: "Bill of Sale of Registered vessel. Frank Waterhouse & Co., Inc., to North Alaska Steamship Co., Steamship called the Garonne. Frank P. Dow, Custom House Broker, Seattle, Wash."

Slip attached to documents: "This is now complete for delivery when you add the name of the buyer and the consideration. (Signed) Frank P. Dow."

[Endorsed]: Exhibit "P-3." Filed in the U. S. Circuit Court. Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Defendants' Exhibit "Q-3."

To All to Whom These Presents Shall Come or may Concern, Greeting:

Know Ye, That Frank Waterhouse and Company, a corporation, having its principal office at Seattle, State of Washington, for and in consideration of

the sum of one dollar ($1.00) lawful money of the United States of America, to it in hand paid by The North Alaska Steamship Company, a corporation, having its principal office at the city of New York, State of New York, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these presents do for itself, its successors and assigns remise, release and forever discharge the said North Alaska Steamship Company, its successors and assigns of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controveries, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims or demands whatsoever in law or in equity, which against The North Alaska Steamship Company, its successors and assigns ever had, now has or which its successors and assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

In witness whereof the said Frank Waterhouse & Company has by the hands of its President and Secretary executed this instrument and affixed a seal on the ninth day of July, 1904.

State of New York,
County of New York,—ss.

On this 9th day of July, 1904, before me personally came William H. Bogle, to me known, who, being duly sworn did depose and say that he resided in Seattle, State of Washington; that he is the secretary of Frank Waterhouse and Company, the corporation described in and which executed the above instrument, that he signed his name thereto with the intent to bind the said corporation to the terms hereof.

THOMAS H. McKEE,
Notary Public,
New York County.

[Endorsed]: Exhibit "Q-3." Filed in the U. S. Circuit Court. Western Dist. of Washington. Jun. 16, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

No. 1290.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Notice of Taking Depositions.

To the Aforesaid Defendants, and to W. H. Bogle, Esq., their Counsel:

You and each of you are hereby notified that, in accordance with an order of this Court made in this cause on August 7th, 1905, appointing Willis Van Valdenburg, Esq., a special examiner to take testimony herein, the testimony of Grenville M. Dodge and Frank S. Pusey, witnesses on behalf of the complainant herein, will be taken before said Willis Van Valkenburg, Esq., at the law offices of Taft & Sherman, No. 15, William Street, in the city of New York, State of New York, at 10 o'clock A. M., on the 21st day of September, 1905, and if not concluded on said date will be continued from time to time, as may be determined by Special Examiner and counsel then

present representing the parties hereto, until finally concluded.

Dated, Seattle, Washington, August 28th, 1905.

G. W. KING,
Solicitor for Complainant.

In the Circuit Court of the United States for Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Order Appointing Special Examiner.

Comes now the complainant herein, by Geo. H. King, Esq., his Counsel, and moves the Court for an order that Willis Van Valkenburg, Esq., a notary public, of New York City, New York, or some other officer authorized by law to take depositions, be appointed Special Examiner to take the depositions of certain witnesses in said New York City, to be used on the trial of this cause, and it appearing necessary to prevent a failure of justice, that the testimony of said witnesses should be taken.

It is ordered that Willis Van Valkenburg, Esq., a Notary Public of New York City, New York, be, and he hereby is appointed a Special Examiner of this court, and that he be, and he is hereby authorized and empowered to take and transmit to this court the testimony of Grenville M. Dodge and Frank S. Pusey and each of them, witnesses in behalf of said complainant, in answer to oral questions to be put to said witnesses by the respective parties at the time of taking such testimony, 15 days notice of time and place of depositions to be given.

Done in open court this 7th day of August, 1905.

C. H. HANFORD,

Judge.

Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 7, 1905. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

United States of America,
Western District of Washington,—ss

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify that I have compared the foregoing copy with the original order appointing Special Examiner, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court, this 7th day of August, 1905.

[Seal] A. REEVES AYRES,
Clerk.
By H. M. Walthew,
Deputy.

[Endorsed]: Certified Copy of Order Appointing Examiner.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,
Complainant,

vs.

FRANK WATERHOUSE & CO., Incorporated (a Corporation), and FRANK WATERHOUSE,
Defendants.

Depositions.

Testimony on behalf of the complainant, taken on the 21st day of September, 1905, under the sixty-seventh rule in Equity, as amended, before Willis Van Valkenburgh, Esq., Special Examiner, appointed by order of the Hon. C. H. Hanford, Judge,

dated August 7th, 1905, and pursuant to notice duly given under said order.

Appearances:

GEORGE H. KING, for the Complainant,

TAFT & SHERMAN (Theodore M. Taft), of Counsel;

W. H. BOGLE, for the Defendants,

GRIGGS, BALDWIN & BALDWIN (David M. Dean), of Counsel.

It is hereby stipulated that the depositions of Gen. Grenville M. Dodge and Frank S. Pusey be taken down in shorthand by the Special Examiner and shall be put into typewriting.

Counsel for complainant handed to the Special Examiner the order appointing him and the notice of taking the depositions.

It is hereby stipulated between the counsel that the taking of the depositions be adjourned to the 28th day of September, 1905, at eleven o'clock in the forenoon, at the office of Taft & Sherman, 15 William Street, New York City, with the same force and effect as if taken on this day.

GRENVILLE M. DODGE

vs.

FRANK WATERHOUSE & CO., et al.

New York, September 28th, 1905.

Met pursuant to adjournment.

Appearances:

THEODORE M. TAFT, for Complainant:

DAVID M. DEAN, for Defendants.

It is stipulated by and between counsel that all objections to the competency, relevancy and materiality of the testimony and any objections except objections as to the form of the questions, may be taken upon the reading of the depositions on the trial of the case, and such objections need not be made at this hearing.

Gen. GRENVILLE M. DODGE, the complainant, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination of Mr. TAFT.

Q. What is your full name, Gen. Dodge?

A. Grenville M. Dodge.

Q. And have you been living here in New York for some time?

A. Yes, for a good many years.

Q. And are you in business in New York?

A. Yes.

Q. Where have you been doing business?

A. Well, for the last fifteen or eighteen years—for the last eighteen years anyhow, at No. 1 Broadway.

(Deposition of Gen. Grenville M. Dodge.)

Q. What is your business?

A. Railroading; I am at the head of several roads and I am also engaged in constructing railroads.

Q. You are designated as a civil engineer?

A. That is my profession.

Q. You are the complainant in this suit against Frank Waterhouse & Company and Frank Waterhouse? A. I am.

Q. Where do you live in New York, or where have you been living for the last three or four years?

A. At the Union League Club.

Q. You are a member of that club?

A. I am.

Q. Are you one of the few honorary members?

A. I am.

Q. Have you examined the Trow City Directory for the last four or five years to see whether you appear in that directory?

A. Yes; I think I have seen that directory every year for four or five years; my name appears in it.

Q. That directory shows your business address at No. 1 Broadway and your house address at the Union League Club? A. Yes.

Q. The Trow City Directory is a standard directory for this city, is it not? A. It is.

Q. You are connected with a good many different organizations, are you not? A. Yes.

(Deposition of Gen. Grenville M. Dodge.)

Q. Will you state some of them?

A. Well, I am connected with the Fort Worth and Denver City Railway, the Colorado Southern Railway, the Wichita Valley Railway, and other roads; and I am a director in the Bowling Green Trust Company. I am a member of three clubs.

Q. Are you a member of the Loyal Legion?

A. Yes; I have been the Commander of it, and I am a member of it.

Q. You are pretty well known in the City of New York among financial and general business men, are you not?

A. Well, yes; I do a good deal of business with a good many people.

Q. You are acquainted with William F. King?

A. I am.

Q. What firm is he connected with?

A. Calhoun, Robbins & Company.

Q. And are you personally known to him?

A. I am; I have known him a great many years.

Q. And you knew his wife?

A. Yes, I knew his wife.

Q. Before she married him and afterwards?

A. Yes.

Q. This William F. King is the same Mr. King who was connected with the North Alaska Steamship Company? A. Yes.

(Deposition of Gen. Grenville M. Dodge.)

Q. And subsequently connected with the Merchants' and Miners' Steamship Company?

A. Yes.

Q. Were you and are you known to Frost & McKee, the attorneys for the North Alaska Steamship Company? A. Yes.

Q. And were you and are you known to W. H. Ferguson, who arranged the sale of the "Garonne" from Waterhouse & Co. to the North Alaska Steamship Company? A. Yes.

Q. And you were and are known to the officers of the North Alaska Steamship Company?

A. Yes.

Q. In the spring of 1904 did you lend any money to the North Alaska Steamship Company?

A. I did.

Q. Do you recall how much you had loaned to them up to the 13th of May, 1904?

A. I think it was about $15,000, but I cannot state exactly—yes, I loaned them $13,500.

Q. (Papers shown witness.) I show you a paper, and ask you what that is?

A. That is an agreement between Mr. Frank S. Pusey, acting for me, and Charles B. Smith, for the North Alaska Steamship Company, and Charles B. Smith personally.

(Deposition of Gen. Grenville M. Dodge.)

(Said paper was marked "For Identification Complainant's Exhibit 1.")

Q. It was on May 13th, 1904, that the agreement was made which set forth the indebtedness to you of $13,500 and agreeing to give you a mortgage on the steamship "Garonne." Did you receive a mortgage on the steamship "Garonne" in compliance with that agreement? A. I did not.

Q. Did you, after the 13th of May, 1904, become anxious in regard to the payment of this indebtedness to you by the North Alaska Steamship Company? A. I did.

Q. What did you do in pursuance of that anxiety?

A. I instructed Mr. Frank S. Pusey to go immediately to Seattle and take proper measures to secure my loan or secure the mortgage on the loan, and, if that was not done, I instructed him to seize the ship or attach the vessel.

Q. Where was the ship at that time?

A. At Seattle, Washington.

Q. Can you tell me the date on which you gave Mr. Pusey those instructions, about?

A. It was a very short time after the signing of this agreement.

Q. Well, was it between that time and the 1st of June?

A. Yes, between that time and the 1st of June.

(Deposition of Gen. Grenville M. Dodge.)

Q. Did you do anything in regard to letters of introduction to Mr. Pusey to people out in Seattle?

A. Yes; I gave Mr. Pusey a letter to Grenville M. Phillips, who was a merchant there, authorizing him to do everything he could to aid Mr. Pusey in the matter; and then I went to the Bowling Green Trust Company and obtained a letter from the Bowling Green Trust Company to their correspondent in Seattle, instructing them to aid Mr. Pusey financially or in any way he might require.

Q. What was the object of his getting financial assistance out there?

A. If we tied up that boat, we expected to have to give bonds, and it was necessary for me to provide for the giving of those bonds, to arrange with some people out there for giving the bonds.

Q. Are you known in Seattle?

A. Yes, I am known there.

Q. Have you lived there?

A. I have not lived there, but I have constructed roads there and have had charge of roads or been connected with roads that ran in there.

Q. Name some of the roads and give the times at which you were connected with them?

A. As chief engineer of the Union Pacific I made the first survey into that country, to Portland, and extended it on to Tacoma; and then for a few years

(Deposition of Gen. Grenville M. Dodge.)

we ran what was known as the Oregon Navigation Company, which was afterwards leased, and it was used and run by the Union Pacific. I went out there afterwards with Mr. Villard and bought that property there. I was afterwards connected with building a road from Portland to Seattle.

Q. During what years were you so engaged?

A. That ran all the way from 1867 up to 1895, perhaps. We ran the first steamship from there to Alaska.

Q. On June 2d, 1904, do you know the amount that was due to you from the North Alaska Steamship Company? A. Yes, $10,000.

Q. Have you received from any source any part of that $10,000? A. I have not.

Q. And there is still due to you from the North Alaska Steamship Company $10,000 with interest thereon from that date? A. Yes.

Q. In your bill of complaint you state that on June 2d, 1904, a note was given by the North Alaska Steamship Company to Frank Waterhouse & Company, as trustee for you, for $10,000; also an agreement was made on that date signed by Frank Waterhouse & Co. agreeing to take a mortgage on the steamship "Garonne," to secure themselves for $37,671.46 and to secure you for $10,000. This is admitted by the answer. Now, will you tell me how

(Deposition of Gen. Grenville M. Dodge.)

Frank Waterhouse & Co. or Frank Waterhouse carried out this agreement with you?

Mr. DEAN.—That question is objected to as to form and upon the further ground that it is instructive to the witness.

A. They never carried it out in any manner.

Q. What communication did you have with them or either of them after June 2d, 1904?

A. I never had any.

Q. Have they or either of them ever written to you personally? A. They have not.

Q. So far as you know have they or either of them ever attempted to communicate with you?

A. They have not.

Q. When did you first learn that the North Alaska Steamship Company had given back the steamship "Garonne" to Frank Waterhouse & Co. or Frank Waterhouse?

A. I think I first learned of it in July.

Q. In July, who called your attention to that?

A. Mr. Pusey.

Q. You received no word whatever from Frank Waterhouse or from Frank Waterhouse & Co.?

A. None whatever.

Q. What was the first communication from Frank Waterhouse or Frank Waterhouse & Co. to anybody

(Deposition of Gen. Grenville M. Dodge.)

concerning the resale of the steamship "Garonne" to the Merchants' and Miners' Steamship Company?

A. It was a communication from them to Mr. Pusey, some time in August, 1904.

Q. All these transactions that you are testifying about in connection with the "Garonne" were in the year 1904? A. Yes.

Q. Where were you during the month of July and the month of August, 1904?

A. I was in the city here, say, two or three days each week and a few miles out of the city on other days.

Q. Were you in telephonic communication with your office daily?

A. I was, and my mail was sent to me.

Q. Now, Gen. Dodge, would there have been any difficulty in Frank Waterhouse or Frank Waterhouse & Co. communicating with you in New York City during the months of July and August, 1904, if they or either of them had really wanted to find you?

Mr. DEAN.—I object to that question on the ground that it calls for a conclusion.

A. There would have been no difficulty in communicating with me.

Q. Was there any difficulty at any time in July or August for any one in the city of New York who

(Deposition of Gen. Grenville M. Dodge.)

really wanted to get into personal communication with you, doing so?

(Objected to on the same ground.)

A. None whatever.

Q. Did you frequently during the year 1904 receive mail addressed to Gen. G. M. Dodge and Gen. Grenville M. Dodge, New York City?

A. I did; I don't know that I received it frequently, but it often came that way.

Q. If any one had looked into the Trow City Directory of the city of New York for Grenville M. Dodge, he would have found your address there?

A. He would.

Q. At No. 1 Broadway?

A. At No. 1 Broadway.

Q. Have you any knowledge of the matters concerned with the sale of the steamship "Garonne" to the Merchants' & Miners' Steamship Company, the details of it? A. No.

Q. Do you know what price the Merchants' & Miners' Steamship Company paid for the steamship "Garonne"? A. I do not.

Q. You do not know, of course, then, whether it was a fair valuation or not?

A. I have heard what the price was.

Q. Yes, but I mean so far as your own knowledge is concerned.

(Deposition of Gen. Grenville M. Dodge.)

A. No, I do not, only what I have heard.

Q. And you had no knowledge of it at the time of the sale? A. No.

Q. Did you receive any notice from the North Alaska Steamship Company after June 2d, 1904, in regard to their giving up the steamship "Garonne" to Frank Waterhouse & Co.?

A. Mr. Smith informed me that the ship had been sold to this new company; he told me what the price was too.

Q. When did Mr. Smith tell you that?

A. It was after he came back from Alaska; it must have been in the fall.

Q. It was later than the 19th of August anyway?

A. Oh, yes, it was October or November; I could not state the exact date.

Cross-examination by Mr. DEAN.

Q. Have you the twelve thousand dollar note which you signed as part of the consideration for this money due to you, in your possession or under your control?

A. It is under my control, but I haven't got it in my possession.

Q. Is it under your control at the Bowling Green Trust Company? A. Yes.

Q. Do you remember to whom that note was made payable? A. No, I do not.

(Deposition of Gen. Grenville M. Dodge.)

Q. Did you sign it or endorse it?

A. I either endorsed it or made it a joint signature, I don't know which.

Q. You became responsible on it?

A. I paid the note myself.

Q. Do you remember whether you signed it jointly with Mr. Smith as an individual or with the North Alaska Steamship Company?

A. I do not. My impression is I endorsed it, but I won't be certain about it, because it is too long ago and it has passed out of my mind.

Q. And you are unable to state here from recollection whether your endorsement or your signing, in case you signed it as a maker with some one, was with Charles B. Smith individually, or with Charles B. Smith as President of the North Alaska Steamship Company?

A. I could not say that absolutely; I know that I paid the note and it was charged up to my account.

Q. The note was paid by the payment of the Ditmar note of $5,000?

A. Yes; there was $5,000 endorsed on it.

Q. The Ditmar note was collateral?

A. Yes.

Q. Was that turned over to you or to the bank?

A. To the bank.

(Deposition of Gen. Grenville M. Dodge.)

Q. And then, after that was credited upon the note, you paid the balance? A. Yes.

Q. By having it charged up to your account?

A. Yes, to my personal account.

Q. And that note is now under your control, so that you could produce it if they were to notify you to?

A. Yes; I suppose by sending my book over there I could get it.

Q. Do you remember when that was charged up to your account? A. When the note became due.

Q. It was some little time after the note became due, was it not, because the collateral was credited on it by the bank?

A. The collateral became due before the note did, and that was credited on it and when the note became due, it was charged up to me.

Q. And has your account been written up since then, so that it is entered in your settled account?

A. No, I do not think it has been; but my recollection is that the note is with the Bowling Green Trust Company, unless it has been taken out and sent to Seattle; I do not know whether that is so or not.

Q. So that it is simply entered and charged up to your open account with the bank? A. Yes.

Q. As to the condition of that account, you have no present recollection one way or the other, I sup-

(Deposition of Gen. Grenville M. Dodge.)

pose? A. What do you mean?

Q. Whether, if you please, it has been balanced, and there is a balance in your favor since the charging up of that note? A. Yes, I think it has.

Q. You have positive recollection about that one way or the other? A. No.

(By Mr. TAFT.)

Q. But you do know that the note has been charged up against your account? A. Yes.

Q. And you also know that the money which was obtained on that note of $12,000 went into the purchase of the steamship "Garonne"? A. I do.

(By Mr. DEAN.)

Q. Could you just give us in what way you know that?

A. Mr. Smith, who was the head of the Alaska Steamship Company at that time, came to me—I had made a payment once before on the vessel of $1,500—he came to me and showed me the telegram from Waterhouse & Co. urging the payment, and told me that unless they could raise this money to make that payment that day, they would default; and I went over to the bank with him; I objected very much to doing it, but, as a personal favor, I went over to the bank on his promise to me that the money should be returned to me or full security given me as quick

as they got this payment made; and I went over to the bank with him to raise the money for him and got the Bowling Green Trust Company to turn the money over to him, and, as he informed me then and there he sent it by telegraph; that was his statement to me.

Q. So that really your own knowledge if it is what Mr. Smith told you? A. Yes.

GRENVILLE M. DODGE.

Subscribed and sworn to before me this second day of October, 1905.

WILLIS VAN VALKENBURG,
Notary Public, Kings Co.

Special Examiner. Cert. filed in N. Y. Co.

Adjourned by consent of counsel to Friday, September 29th, 1905, at 10 o'clock A. M.

DODGE

v.

WATERHOUSE.

New York, September 29th, 1905.

Met pursuant to adjournment. Same appearance as before.

FRANK S. PUSEY, a witness called in behalf of the complainant, being duly sworn, testified as follows:

Direct Examination by Mr. TAFT.

Q. Mr. Pusey, what is your full name?

A. Frank S. Pusey.

Q. What is your address?

A. No. 1 Broadway.

Q. What relation are you to the complainant, Gen. Grenville M. Dodge? A. Son-in-law.

Q. Did you know of Gen. Dodge advancing any money to the North Alaska Steamship Company in the early part of 1904? A. Yes, sir.

Q. Do you know what that money was used for?

A. It was used in part payment of the purchase money of the steamship "Garonne."

Q. Will you state what the sale of the steamship "Garonne" was in which this money was used?

A. The agreement was entered into between Mr. Frank Waterhouse and Waterhouse & Co. with the North Alaska Steamship Company whereby the former entered into a contract to transfer and sell to the

(Deposition of Frank S. Pusey.)

North Alaska Steamship Company the steamship "Garonne."

Q. On May 13th, 1904, how much was owing to Gen. Dodge for moneys advanced or loaned to the North Alaska Steamship Company for the purpose of purchasing the steamship "Garonne"?

A. $13,500.

Q. Was there a written agreement made between you as trustee for Gen. Dodge and the North Alaska Steamship Company on that date?

A. Yes, sir.

Q. (Paper shown witness.) I show you a paper marked yesterday for Identification "Complainant's Exhibt 1" and ask you what it is?

A. This is the agreement between Charles B. Smith, the North Alaska Steamship Company, by Charles B. Smith, President, and myself as Trustee for Gen. Grenville M. Dodge.

Q. Where was that paper prepared?

A. That was prepared by the attorneys for the North Alaska Steamship Company.

Q. Who were they?

A. McKee & Frost, at the office of McKee & Frost.

Q. Was that paper prepared after the negotiations between you, representing Gen. Dodge, and the North Alaska Steamship Company?

(Deposition of Frank S. Pusey.)

A. Yes, sir.

Q. When was that paper executed?

A. On the 13th day of May, 1904.

Q. And is that the agreement as it was delivered to you? A. Yes. sir.

Mr. TAFT.—I offer this agreement in evidence.

(Received in evidence and marked Complainant's Exhibit 1, by striking out the words "For Identif," Sept. 29, 1905.)

Q. When did you go to Seattle in regard to collecting this indebtedness or securing the indebtedness from the North Alaska Steamship Company to Gen. Dodge?

A. Between the 20th and 23d of May; I think it was the 21st of May, 1904.

Q. How did you happen to go?

A. I was instructed to go by Gen. Dodge, with positive instructions to secure beyond question of doubt this indebtedness of the North Alaska Steamship Company to him prior to the sailing of the steamship "Garonne," billed to sail June 2d, 1904.

Q. Was there any particular reason why you went out to Seattle at this particular time?

A. Yes, sir. The steamship was advertised to sail on the 2d of June, and I had information that she was well booked in the way of passengers and freight and

(Deposition of Frank S. Pusey.)

I considered it a prudent time to protect Gen. Dodge's interest in the ship.

Q. In what way to protect Gen. Dodge's interest?

A. Either by full payment of his claim, or by attaching the ship and garnisheeing the freight moneys.

Q. Up to the time you went to Seattle had anything been paid on the indebtedness due from the North Alaska Steamship Company to Gen. Dodge?

A. No, sir.

Q. Between the time that you arrived at Seattle and the 2d of June, when the agreement set forth in the bill of complaint was signed by Frank Waterhouse & Co., had the indebtedness been reduced?

A. Yes, sir; there was a payment of $5,000 in New York City on the 1st day of June.

Q. How much was due on June 2d?

A. $10,000 was due on June 2d.

Q. Had there been any increase in the amount from the North Alaska Steamship Company to Gen. Dodge from the 13th of May, which then was $13,500, to the 2nd of June, when it was agreed that it was $10,000?

A. Yes, sir; there was an agreement between the President of the Steamship Company, who was on the ground, and myself, that $1500 additional would be allowed for my expenses and any costs that might

(Deposition of Frank S. Pusey.)

have been incurred in view of the fact that they had not met the payment due Gen. Dodge.

Q. Under the agreement of May 13th?

A. Yes, under that agreement.

Q. When did you arrive at Seattle?

A. On Friday, the 29th of May, 1904.

Q. What did you do there after you arrived?

A. I went at once to the Seattle National Bank, to whom I had a letter of introduction from the Bowling Green Trust Company, in which the Seattle National Bank were protected through this letter from the Bowling Green Trust Company in giving me and financial assistance I should need in case I had to file bonds under legal steps, such as garnisheeing freight moneys or attaching the vessel.

Q. Is Gen. Dodge a director of the Bowling Green Trust Company? A. Yes, sir.

Q. And is Frank Waterhouse, one of the defendants herein, a director of the Seattle National Bank?

A. Yes, sir; he was at that time.

Q. That is the bank to which you took letters of introduction? A. Yes.

Q. After you had presented your letters of introduction to the Seattle National Bank and had made your arrangements there, then what did you do?

A. First, before leaving them, I inquired and found out that I could get this financial protection,

(Deposition of Frank S. Pusey.)

and they told me the name of a bonding company that I could go to; and also they gave me the name of their city attorney, in case I should require his services; and from there I went to the office of Mr. Frank Waterhouse.

Q. Now tell what occurred at the office of Frank Waterhouse & Co.?

A. I sent in my card to Mr. Waterhouse—

Q. What did your card contain?

A. "Frank S. Pusey"—a personal card. He came out of his private office and I told him that I represented Gen. Grenville M. Dodge of No. 1 Broadway, New York, and that I was here to protect his interests in the steamship "Garonne," in compliance with the agreement signed by the Steamship Company and by me as Trustee for him, referred to herein, dated May 13th, 1904.

Q. Did you show this agreement of May 13th, 1904, marked "Complainants' Exhibit 1, Sept. 29, 1905," to Mr. Waterhouse? A. Yes, sir.

Q. Did he take it?

A. No; I kept it; he read it and looked it over and returned it to me; I did not leave it with him.

Q. Whom did you tell him you represented?

A. Gen. Grenville M. Dodge, of No. 1 Broadway, New York.

(Deposition of Frank S. Pusey.)

Q. Did Mr. Waterhouse say anything to you showing his knowledge of Gen. Dodge, and if so, what?

A. Yes, sir; when I mentioned Gen. Dodge's name, he said, "I have known of him very well on account of his prominence"; and I explained that he had been the Chief Engineer of the Union Pacific Railroad and had had charge of its construction and was one of the largest railroad builders in the country; and he showed from his conversation with me that he knew Gen. Dodge very well by reputation.

Q. Were Waterhouse & Co. or Frank Waterhouse advertising the sale of the steamship "Garonne" at that time?

A. They were advertising it as agents, giving the date in the local papers that the steamship "Garonne" would sail on the 2d of June, and soliciting freight and passenger business, and signing the advertised article "North Alaska Steamship Company, per Frank Waterhouse & Company, Agents."

Q. Do you recall whether there was anything after "North Alaska Steamship Company" in the advertisement?

A. Yes; I recall this, that it was signed by Frank Waterhouse & Company, under "North Alaska Steamship Company."

Q. Anything else?

(Deposition of Frank S. Pusey.)

A. The heading was the "Steamship Garonne," but it was signed "North Alaska Steamship Company, per Frank Waterhouse & Company, Agents" in one of the local papers.

Q. What else, if anything, did you say to Frank Waterhouse in regard to your business out there in Seattle?

A. I told him that my object in getting there before the 2d of June was to have a settlement of Gen. Dodge's claim, and that if I did not get a settlement satisfactorily, I would attach the ship and garnishee the freight moneys.

Q. After you had this conversation with Frank Waterhouse, did you see the steamship "Garonne"?

A. Yes, sir; Mr. Waterhouse in our conversation had said that the steamship had been thoroughly overhauled and had been in drydock and painted up and fitted for the voyage, and that it was at the dock and that he would be glad to take me down and look it over.

Q. Did you go with him?

A. I did; and we went over the ship very thoroughly. She was coaling up at the time; her decks were covered with canvas to protect her from the dust, and she seemed to be in prime condition in every way inside and out; and I noticed that the

(Deposition of Frank S. Pusey.)

staterooms were being fitted up with new bedding, such as matresses, and so forth.

Q. Did Mr. Waterhouse make any remarks at all in regard to the condition of the boat at that time?

A. Yes, sir; he said that she was in perfect condition for the trip; that they had spent a good deal of money on her, and that he considered her the best ship afloat between Seattle and Nome.

Q. When did Charles B. Smith, President of the North Alaska Steamship Company, arrive out in Seattle?

A. He arrived in Seattle on Sunday, the 31st of May, 1904, Sunday morning.

Q. You saw him after he arrived?

A. Yes, sir; I called on him at his hotel.

Q. Did you and Mr. Smith and Frank Waterhouse meet and have a talk in regard to the situation?

A. Yes, sir, on the following day, Monday.

Q. Where did that occur?

A. Mr. Smith and I went to Mr. Waterhouse's office, and we went over the situation, the three of us, together, chiefly looking into the question of the freight moneys and passenger list that was being booked for the "Garonne," and more particularly to see if we could arrive at an agreement wherein all three interests would be satisfied.

(Deposition of Frank S. Pusey.)

Q. You speak of three interests; you mean the amount due Waterhouse & Co. on the purchase price of the boat—

A. (Interrupting.) Yes, and the interest of the North Alaska Steamship Company and the interest of Gen. Grenville M. Dodge.

Q. That was on what date?

A. That was on Monday, the 1st of June, 1904.

Q. Was anything said at that meeting in regard to coming to any agreement?

A. Yes, sir; that afternoon we met Mr. Frank Waterhouse's attorney, and formulated terms of agreement; and Mr. Waterhouse's attorney took notes to have his stenographer prepare the papers to be signed the following day.

Q. Were the terms of the papers to be signed the following day discussed at that meeting?

A. Yes, fully.

Q. When did you see Mr. Waterhouse again?

A. On Tuesday morning I called at his office, and the papers were not ready, and we arranged to meet Tuesday afternoon at two or three o'clock; I do not recall the exact time.

Q. Did you meet at two or three o'clock on Tuesday?

(Deposition of Frank S. Pusey.)

A. Yes; on Tuesday, June 2d, in the afternoon we met and the papers were ready; and at that meeting were Frank Waterhouse and Mr. Charles B. Smith, Mr. Frank Waterhouse's attorney and myself, and at that time these papers were signed.

Q. (Papers shown witness.) I show you a paper and ask you what it is?

A. This is a promissory note for $10,000, "North Alaska Steamship Company by Charles B. Smith, President," in favor of Frank Waterhouse & Company as trustee for Gen. Grenville M. Dodge.

Q. And that paper was signed and delivered at that meeting?

A. Yes, sir.

Mr. TAFT.—I offer this note in evidence.

(Marked "Complainant's Exhibit 2, Sept. 29, 1905.")

Q. (Paper shown witness.) I show you another paper and ask you what that is?

A. This is the agreement between myself as agent for Grenville M. Dodge and Frank Waterhouse & Company (Incorporated), by Frank Waterhouse, President, executed on the same date.

Q. At the same time?

A. Yes, sir, at the same meeting.

Q. And delivered at the same time?

(Deposition of Frank S. Pusey.)

A. Delivered at the same time.

Mr. TAFT.—I offer this paper in evidence.

(Marked "Complainant's Exhibit 3, Sept. 29, 1905.")

Q. (Paper shown witness.) I show you another paper and ask you what it is?

A. This is a copy of the contract entered into between Charles B. Smith, President of the North Alaska Steamship Company, and Frank Waterhouse & Co., whereby the indebtedness of Frank Waterhouse is set worth as $37,671.46, and also the indebtedness of the North Alaska Steamship Company to Frank Waterhouse & Co., as Trustee for G. M. Dodge, to the amount of $10,000.

Q. You speak of that as a copy of a contract. More accurately it is a copy of a mortgage, is it not?

A. It is a copy of the mortgage, the original of which I saw executed in the presence of Frank Waterhouse and his attorney.

Q. You saw the original executed? A. Yes.

Q. Where did you get that copy from?

A. This was handed to me by Mr. Waterhouse.

Q. When?

A. At the meeting, after the signatures were attached; it was turned over to me after the original was duly executed.

(Deposition of Frank S. Pusey.)

Q. As a correct copy of what had been executed?

A. Yes, as a correct copy of what had been executed.

Mr. TAFT.—I offer this paper in evidence.

(Marked "Complainant's Exhibit 4-M, Sept. 29, 1905.")

Q. Did Charles B. Smith, President of the North Alaska Steamship Company, also transfer to Frank Waterhouse & Co., as Trustee, any of the freight moneys to be collected from the first voyage of the steamship "Garonne"? A. Yes, sir.

Q. Were any of these freight moneys ever paid to Gen. Dodge or to you as agent for Gen. Dodge, from Frank Waterhouse & Co.? A. No, sir.

Q. Nothing was ever received by either of you from that source? A. No, sir.

Q. After these papers had been executed, which you have testified to, did you then leave Seattle?

A. After they were executed I said to Waterhouse that afternoon that now that I had seen the steamship and this agreement had been entered into whereby our interests were protected by first and second mortgage, that if there should be any difficulty about the payment of that mortgage, I stood ready for Gen. Dodge to co-operate with Frank Waterhouse & Co. in purchasing and protecting our individual claims under our mortgage rights.

(Deposition of Frank S. Pusey.)

Q. You speak of a first and second mortgage. There was only one mortgage executed; isn't that so?

A. There was one mortgage in which the priority was given to Frank Waterhouse & Co., but that the second mortgage was embodied in the first mortgage as a part of the same.

Q. That more fully appears by the terms of the mortgage itself? A. Yes.

Q. When you say "in accordance with your rights under the mortgage," what do you refer to there by your mortgage rights?

A. That we were then at the time I was speaking of secured by a mortgage for Gen. G. M. Dodge's individual claims.

Q. Do you mean in case of foreclosure and sale under the mortgage?

A. In case of foreclosure, naturally, if they failed to comply with the terms of the agreement.

Q. Then it was the understanding that Frank Waterhouse & Co. would join in the purchase of the vessel to protect your joint interests?

A. Yes. I would say in that connection that I felt at the time personally willing to assume the full amount, if necessary, in order to protect Gen. Dodge's claim.

(Deposition of Frank S. Pusey.)

Q. Did you explain to Mr. Waterhouse anything about the financial ability of Gen. Dodge to do this?

A. Yes, sir; I told him that he was fully able to handle a proposition of this kind; that it was certainly far less an undertaking than he had been in the habit of handling.

Q. Now, Mr. Pusey, was there any other conversation with Frank Waterhouse in which Mr. Waterhouse said anything to show that he knew where Gen. Dodge's office was in New York, and, if so, what was that?

A. After closing up this affair satisfactorily to myself, at least, he stated that he was interested in a proposition that had been submitted to him for the purchase of a couple of steamers that were at that time at Toledo, Ohio, which he wished to have brought about and put into service on Puget Sound, and that he considered it a very flattering proposition, and would like to interest me in the same, provided I could interest capital in New York City to join with us in the purchase of these two vessels. I told him then that, through my connection with Gen. Dodge and acquaintance in New York, it would be very likely that I could be of some assistance to him to that end; and he then and there said that he would be on to New York very soon, and would call on me at the office of Gen. Dodge at No. 1 Broadway,

(Deposition of Frank S. Pusey.)

which office, in the course of our conversation he demonstrated to me beyond all question of doubt that he knew its locality and would have no difficulty in finding either Gen. Dodge or myself at that address.

Q. Did he speak of knowing the building, No. 1 Broadway?

A. Yes, either he or I spoke of the location, of it being at Bowling Green and the Battery, overlooking New York Harbor.

Q. When did you leave Seattle?

A. I left Seattle the following morning, June 3d.

Q. After you left Seattle on June 3d, did you have any communication with Frank Waterhouse or Frank Waterhouse & Co., and, if so, when did you have it?

A. On my return to New York on the 14th of July, when I arrived, and on the following day, the 15th of July, I telegraphed Mr. Waterhouse to ascertain the present status of our joint claim, and to further ascertain whether he had in fact collected any freight moneys from the first voyage.

Q. (Paper shown witness.) I show you a paper and ask you whether that is a copy of a telegram that you sent to Frank Waterhouse?

A. Yes, sir.

(Deposition of Frank S. Pusey.)

Mr. TAFT.—I offer this telegram in evidence.

(Marked "Complainant's Exhibit 5, Sept. 29, 1905.")

Q. Did you get any reply to that telegram?

A. No, sir.

Q. What was your first communication to Mr. Waterhouse?

A. I would like to explain my answer to your first question. I did not get a reply to it, and for that reason I sent an inquiry to Seattle to see whether it had been delivered; and I got a statement from the agent of the Western Union at Seattle that it had been received and signed by Waterhouse.

Q. You do not know whether that was Waterhouse's signature, or the signature of a clerk?

A. No, I do not; I only give it as it says here.

Q. When was your next communication to Frank Waterhouse?

A. On the 27th of July, 1904, I wrote him a letter.

Q. (Paper shown witness.) Is that a copy of the letter that you wrote him? A. Yes, sir.

Mr. TAFT.—I offer this letter in evidence.

(Marked "Complainant's Exhibit 6, Sept. 29, 1905.")

(Deposition of Frank S. Pusey.)

Q. In this letter of July 27th, you say: "I learn through Mr. King that you have disposed of the steamship Garonne to a new company." What Mr. King is that?

A. Mr. W. F. King, of Calhoun, Robbins & Company.

Q. The same Mr. King who was referred to in Gen. Dodge's testimony of yesterday?

A. Yes, sir.

Q. When did you receive this word from Mr. King that Frank Waterhouse had disposed of the steamship "Garonne" to a new company?

A. Probably that day, or the day prior to the writing of the letter.

Q. Had you or Gen. Dodge any knowledge whatsoever of any sale of the steamship "Garonne" to a company other than the North Alaska Steamship Company up to on or about July 26th, 1904, say?

A. I had no direct knowledge of that fact at that date. The first rumor I heard of it was through Mr. Leak of the North Alaska Steamship Company, who stated that Mr. King had, with his associates, purchased the steamship and all the rights of the North Alaska Steamship Company therein. So that the matter of a day or two possibly may have intervened prior to my sending this letter, as I wished

(Deposition of Frank S. Pusey.)

to ascertain all the facts in the matter before writing Mr. Waterhouse.

Q. General Dodge, in his testimony yesterday, said that he learned of this new transfer of the steamship "Garonne" to Mr. King's company from you in July. Can you specify the date on which you told Gen. Dodge of what you had learned?

A. I should say about anywhere from the 25th to the 27th of July.

Q. It was not prior to the 25th?

A. I should say not.

Q. Did you see Mr. King in regard to his having purchased the steamship "Garonne"?

A. Yes, sir.

Q. When did you see him?

A. When I learned from Mr. Leak that Mr. King had made this purchase, I called on Mr. King, as I knew him personally and had for a number of years; and I got the information direct from him that he had formed a new company and purchased the steamer and had absolute control of the various sub-companies, including the North Alaska Steamship Company.

Q. When did you first hear from Frank Waterhouse & Co. after June 2d, 1904?

(Deposition of Frank S. Pusey.)

A. The first communication came to me about the 19th of August, 1904; I think his letter was of that date; it arrived here six days later.

Q. So you would not have heard from him until somewhere around the 25th of August, the letter itself being dated the 19th? A. No.

Q. And that was the first communication that you had from Frank Waterhouse?

A. Yes, sir.

Q. After leaving him on June 2d, 1904?

A. Yes, sir.

Q. The letter of August 19th from Waterhouse & Co. was the first notice you received from them as to the subsequent sale of the "Garonne" to the Merchants' and Miners' Steamship Company?

A. Yes, sir.

Q. Do you know when the Merchants' and Miners' Steamship Company was incorporated?

A. I saw a paper with a notice of the incorporation on the 12th of July, I think it was.

Mr. TAFT.—I offer in evidence a letter from the Secretary of State the State of New York stating that the Merchants' and Miners' Steamship Company had filed their articles of incorporation in his office on the 12th day of July, 1904.

(Deposition of Frank S. Pusey.)

(Marked "Complainant's Exhibit 7, Sept. 29, 1905.")

Q. I see among the incorporators mentioned here is A. J. Baldwin. Do you know who A. J. Baldwin is?

A. Arthur J. Baldwin, yes, sir; I am personally acquainted with him.

Q. What is he, a lawyer?

A. Yes, sir, an attorney.

Q. Do you know his firm?

A. Griggs, Baldwin & Baldwin, I believe now.

Q. And they are the attorneys who represent Frank Waterhouse and Frank Waterhouse & Company, Incorporated, on the taking of these depositions? A. I so understand.

Q. How long have you known Mr. A. J. Baldwin?

A. I met Mr. Baldwin in 1902; we sailed on the same steamer, January 4th, for Havana, Cuba, and occupied the same stateroom.

Q. Have you examined the Trow City Directory for 1904? A. Yes, sir.

Q. To see whether you appear in that directory?

A. Yes, sir.

Q. What did you find?

A. I found my name appearing there as "Frank S. Pusey, Broker, Room 218, No. 1 Broadway."

(Deposition of Frank S. Pusey.)

Q. Do you remember a conversation with Mr Waterhouse about his attempting to call on Gen Dodge with W. H. Ferguson?

A. Yes, sir; as I recall it, he said that he had been in New York at the same time with Mr. Ferguson—

Q. Give about the date.

A. During the spring of 1904, after negotiations had been entered into for the purchase of the steamer "Garonne."

Q. By what?

A. By the North Alaska Steamship Company and that he had intended to go down with Mr. Ferguson and meet Gen. Dodge, whom he knew as one of the backers of the North Alaska Steamship Company, and that he was too busily engaged with other matters to accompany Mr. Ferguson on that visit.

Q. When did Mr. Waterhouse tell you that?

A. While I was in Seattle in June, 1904.

Q. What was the date that Mr. Waterhouse referred to as being in New York and wishing to call

A. He did not specify any date.

Q. Well, was that in the spring of the year, or when?

A. In the spring of the year 1904—the latter part of the winter, or early spring—some time after February.

(Deposition of Frank S. Pusey.)

Q. And prior to May 13th?

A. And prior to May 13th.

Cross-examination by Mr. DEAN.

Q. Did he, Mr. Waterhouse, give any reasn why he was unable to see or find Mr. Dodge?

A. He said he was too busily engaged to accompany Mr. Ferguson.

Q. He spoke of the sum of $1,500 being added or allowed by the president of the steamship company for expenses. Is that sum of $1,500 any part of the ten thousand dollar note—does it go to make up the ten thousand dollar note?

A. It goes to make up the ten thousand dollar note.

Q. When was that allowance of $1,500 fixed or agreed upon?

A. At my interview with Mr. Charles B. Smith in Seattle, as president of the steamship company, allowing it to me for costs and traveling expenses incurred incident to my going to Seattle to protect Gen. Dodge's claim. I should say that was about June 1st, 1904.

Q. How was the money paid by Gen. Dodge when he loaned them this monew that you speak of, do you know?

(Deposition of Frank S. Pusey.)

A. By an individual endorsement with Mr. Smith for the loan of $12,000 from the Bowling Green Trust Company.

Q. When was that?

A. The exact date I cannot give you, but it was in the spring of 1904, between February and May 13th.

Q. You mean that he endorsed a note with Mr. Smith at that time?

A. He signed, as I recall it, a note with him, and gave an individual check for $1,500 some days later, bringing the sum up to $13,500.

Q. So that $13,500 is the sum total of all the moneys that he loaned the steamship company?

A. No, sir; he advanced—the exact amount I cannot state; he advanced money on gold dust or nuggets that were brought down from Alaska by one of the chief officers or managers of the North Alaska Steamship Company, Mr. Rowe.

Q. Was that a loan of money to the Steamship Company, or an individual transaction?

A. No; that was for the benefit of the Steamship Company, as they required the funds.

Q. Do you know how that money was paid, how it was advanced, whether by check or draft or how?

A. I do not know; probably by check; that was the custom.

(Deposition of Frank S. Pusey.)

Q. Do you know how Gen. Dodge paid the note which he signed or indorsed?

A. No, I do not know.

Q. Do you know from what funds that twelve thousand dollar note which Gen. Dodge signed was paid?

A. I believe from his personal balance at that bank.

Q. That would hardly answer the question, perhaps?

A. I do not know positively from what fund it was paid.

Q. You spoke of some money being repaid to Gen. Dodge; what moneys do you know were repaid to Gen. Dodge?

A. I know that a five thousand dollar note of a Mrs. Ditmar, which was held as collateral, attached to the twelve thousand dollar note was paid to the Bowling Green Trust Company, and that sum of five thousand dollars was applied on the note of twelve thousand dollars.

Q. Do you know what the amount of the Ditmar note was when it was applied on this $12,000 note?

A. Five thousand dollars even.

Q. And possibly some interest?

A. I think not.

(Deposition of Frank S. Pusey.)

Q. Do you know of any other collateral that was applied upon the twelve thousand dollar note?

A. There was none.

Q. The sum of $1500 allowed for expenses was just an arbitrary sum which you and Mr. Smith agreed upon, was it not?

A. I do not understand the word "arbitrary" in that connection.

Q. You did not figure it up absolutely one way or the other, but simply said "We will call it so much?"

A. It was a final adjustment of moneys to cover the estimated costs, legal or traveling expenses, definitely fixed at $1500.

Q. What had been your actual expenses, as nearly as you can tell, up to the time that sum was fixed upon?

A. My personal expenses?

Q. Well, your expenses in attempting to secure or collect the money?

A. I could not answer that definitely.

Q. I did not expect you could, but give it as nearly as you can?

A. I recall that I started out on that trip with $500, and I had to draw on New York before I got back. I presume that the actual personal expenses that I was put to would be somewhere under $500.

(Deposition of Frank S. Pusey.)

Q. You were about how long going there, five or six days?

A. I was six days, I believe.

Q. Continuously on the train?

A. Yes, except a short stop over at night at Portland.

Q. In fixing the sum of $500, do you include anything for attorneys' fees? A. No, sir.

Q. Would you think on reflection that $500—that it actually cost you $500 to travel from New York to Seattle and remain there the time that you did?

A. Until my return to New York?

Q. How long were you in Seattle?

A. I presume five days—six on the outside; but I did not return on the trip until the 15th of July.

Q. Well, do you know what the fair actual expense of going to Seattle and remaining there five days and returning would be?

A. No, I do not.

Q. Living in Seattle—hotel expenses are about how much?

A. About four dollars a day.

Q. Well, $4 or $5 a day at least?

A. $4 or $5 a day, hotel expenses.

Q. And the railroad fare and ordinary expenses in traveling from New York to Seattle are about how much?

(Deposition of Frank S. Pusey.)

A. I really do not know; I should judge the railroad fare and Pullman and meals would be about $100 each way.

Q. So that if you limited it to the ordinary necessary expenses to go there and remain the time you did, it would be nearer, say, $250, would it not?

A. Probably, if I returned at once.

Q. What went to make up the balance of the $1500?

A. The probability at that time of legal, attorney's fees and costs that would naturally result from legal steps to protect the interests of Gen. Dodge until the payment of his claim.

Q. The $1500 was agreed upon before you had any talk with Mr. Waterhouse, was it not?

A. When we arrived at this understanding we had had our talk with Mr. Waterhouse and his attorney about how things were going to be shaped up that day.

Q. Then, at the time, or rather after you had a talk with Mr. Waterhouse and Mr. Smith and in a general way fixed upon how this money should be secured through Mr. Waterhouse, you then, after that, agreed with Mr. Smith upon this sum of $1500?

A. We at that time agreed that $1500 should be added to make up Gen. Dodge's claim to the amount of $10,000.

(Deposition of Frank S. Pusey.)

Q. Was Mr. Waterhouse present when that talk was had?

A. When the sum total was agreed upon.

Q. Not the sum total, but was Mr. Waterhouse present when this talk of $1500 was had?

A. I think not; I think it was prior to my personal interview with Mr. Smith.

Q. But I understand your evidence here is that the $1500 was fixed upon after you had had an arrangement, or a tentative arrangement, if you please, with Mr. Waterhouse. Do you wish to correct that?

A. I wish to correct it to this extent, if I made that statement, that the $1500 was agreed upon between Mr. Smith, as President of the North Alaska Steamship Company, and myself, prior to the signing and execution of the contract as between Frank Waterhouse & Co. and the North Alaska Steamship Company and also prior to the signing of the contracts between Frank Waterhouse and myself as trustee for Grenville M. Dodge.

Q. The written agreements referred to in your last answer were but the completion of a prior oral arrangement which you had with Mr. Waterhouse and Mr. Smith, were they not? A. Yes, sir.

Q. And was the $1500 expenses which you speak of fixed and agreed upon after that oral arrangement and prior to the execution of the written agreements?

(Deposition of Frank S. Pusey.)

A. Prior to the oral arrangement between myself and Mr. Smith to cover any possible legal expenses.

Q. I understood by your last answer that you fixed the time of fixing the $1500 as prior to the written agreements. Now you place it prior to any oral talk whatever in regard to it with Mr. Waterhouse, do you? A. To any oral—

Q. (Interrupting)—arrangement with Mr. Waterhouse?

A. I think the same day, after calling on Mr. Waterhouse, that on that day, Monday, I saw Mr. Smith and agreed that the legal costs would probably amount to that.

Q. What I desire, Mr. Pusey, is to place upon the record, as you desire it, just what the fact is?

A. Yes.

Q. Now, we have it upon the record that the $1500 was agreed upon prior to the execution of the written agreements. A. Yes.

Q. Now, we also have upon the record that there were oral arrangements made between you and Mr. Waterhouse for the written agreements, before the written agreements were actually made. Now, please place upon the record as you understand it from your best knowledge whether the agreement upon $1500 for expenses was made before the oral arrangements you had with Mr. Waterhouse?

(Deposition of Frank S. Pusey.)

A. I believe that same day, Monday, I had talked with Mr. Waterhouse and Mr. Smith both on that day. I did not discuss the subject, the item of $1500 with Mr. Waterhouse; that was entirely arranged with Mr. Smith to cover any possible fees which, I wish to say, were in addition to expenses, which you put in your question—I saw the possibility of legal expenses.

(By Mr. TAFT.)

Q. Was there any question of any interest in the old indebtedness included in the $1500?

A. It covered everything.

Q. The only point I am making is this: Mr. Dean is now trying to find out what that $1500 was to include. Was there any interest item on the prior indebtedness of $12,000 and $1500 included in the item of $1500 agreed upon between you and Mr. Smith at Seattle?

A. Not specifically, but generally covering all costs that had accrued in the transaction or to accrue in the transaction, were covered by this $1500.

Q. And one of the items of that was interest, was it?

A. I do not think it was specified, as I remember it, although I was aware of the fact that there was a long lapse of time there.

(Deposition of Frank S. Pusey.)

(By Mr. DEAN.)

Q. Now, you say you had the talk with Mr. Smith about the $1500 not in the presence of Mr. Waterhouse; Mr. Waterhouse knew nothing about that?

A. Not to my knowledge.

Q. Now you say it occurred on the same day?

A. Or the previous day—Sunday or Monday—I am not positive of the date.

Q. When you had the oral talk with Mr. Waterhouse, you talked it all over, so that when the writings were executed, they were simply to carry out the oral talk, were they not?

A. Yes, sir, the oral talk that I had with him.

Q. Somewhere you spoke of some one taking notes from which they could draw the written agreement?

A. Yes, sir, the attorney for Mr. Waterhouse.

Q. (Exhibits handed witness.) Will you please select out which contract or agreement it was that was prepared from the notes which the attorney took?

A. This is the one (referring to Complainant's Exhibit 4) and this is also one (referring to Complainant's Exhibit 3) and this is one also, prepared by the same attorney (referring to Complainant's Exhibit 2).

Q. Then, Complainant's Exhibits 2, 3, and 4, which I now show you, were prepared by the at-

(Deposition of Frank S. Pusey.)

torneys from notes which they took at the time referred to in your direct examination when you say the attorneys took notes from which they prepared the contracts; is that right?

A. The attorney being present, I presume he took notes; I would not swear that he took them. The conditions and terms were talked over and discussed with him, and I presume he took the notes down.

Q. Well, the attorney learned when present at that conference with you and Mr. Waterhouse that the amount was $10,000 did he not?

A. Yes, sir.

Q. After that conference, you did not see the attorney until the agreements were prepared, did you? A. No, sir.

Q. So that whatever information you gave him in regard to the amount was given at that conference?

A. Yes, sir, as to $10,000 being the amount of the claims due Gen. Dodge.

Q. Did you have more than one conference with Mr. Waterhouse when the attorney was present?

A. The attorney was present at the next meeting when the papers were executed.

Q. What attorney was it that was present who you assumed took notes?

(Deposition of Frank S. Pusey.)

A. His name I cannot give you; he was introduced to me as the attorney for Mr. Frank Waterhouse by Mr. Frank Waterhouse.

Q. Where was that?

A. In Mr. Frank Waterhouse's private office.

Q. And was it in Mr. Frank Waterhouse's private office that you had the oral talks prior to the written agreement? A. Yes, sir.

Q. On all occasions the talk was in Mr. Frank Waterhouse's office? A. Yes, sir.

Q. Can you tell whether the $1500 was fixed upon before you had any talk with Mr. Waterhouse whatever about securing your claim or helping you to secure it, or afterwards?

A. I cannot say definitely my impression is it was the same day, Monday.

Q. That is as near as you can put it?

A. Yes, that is as near as I can put it.

Q. Whether it was before you had any talk with Mr. Waterhouse or whether it was fixed upon afterwards, you cannot state positively?

A. I could not say positively—now that it is called to my attention I remember I called upon Mr. Waterhouse before Mr. Smith arrived.

Q. You saw Mr. Waterhouse on Saturday when you arrived in Seattle did you not?

A. On Friday when I arrived in Seattle.

(Deposition of Frank S. Pusey.)

Q. Before Mr. Smith ever came there, did you talk with him and have an oral arrangement with him that he would execute these written agreements?

A. I called on him and had an interview with him and talked over the situation.

Q. When did he agree with you orally that he would make these agreements which were afterwards written out?

A. On Monday afternoon the terms were talked over and were to be presented the following day and executed if found satisfactory.

Q. On Monday afternoon, June 1st, you talked over and agreed upon what the written agreement should be, did you not? A. Yes, sir.

Q. Now, at that time, had you seen Mr. Smith?

A. Oh, yes, the day before, Sunday, at his hotel.

Q. And on Saturday before that Monday had Mr. Waterhouse assented to your proposition to secure or help secure your debt? A. No, sir.

Q. The $5000 which Mr. Smith assigned to Mr Waterhouse as trustee was assigned by an instrument in writing, was it not?

A. Yes, of the freight moneys to be collected by Mr. Smith for Frank Waterhouse, trustee.

Q. That was done by some writing, was it not?

A. Yes.

(Deposition of Frank S. Pusey.)

Q. (Paper shown witness.) And is this the writing, this paper which I show you?

A. Yes, sir, that is it.

(The written assignment referred to by the witness is marked "For Identification, Defendants' Exhibit A.")

Q. How did you come in possession of this written assignment of the $5000 freight money?

A. Mr. Frank Waterhouse enclosed this paper with the other papers, including the $10,000 note in his letter dated August 19th.

Q. When you went to Seattle, did you have the notes from the bank and the vouchers which showed what this debt was—did you take them with you to Seattle? A. No, sir.

Q. Did you have a statement of the amount of the claim due?

A. I had a verbal statement made by an officer of the bank.

Q. What was the amount that you learned when you went there you were to secure as actually due the bank?

A. $12,000 with accumulated interest.

Q. How did it ever come down to $10,000—I mean at the time you went to Seattle?

(Deposition of Frank S. Pusey.)

A. On June 1st, 1904, I received a telegram from the Bowling Green Trust Company that the $5000 had been paid and applied on the indebtedness.

Q. And before you started to Seattle you were informed that there was just $12,000 due?

A. At the bank, yes.

Q. So that on receipt of that telegram you understood there was just $7,000 left due to the bank?

A. Due to the bank, and interest.

Q. Do you know how much the interest was?

A. No, sir.

Q. When was the note for $12,000 signed by Gen. Dodge?

A. On the 15th of February, 1904.

Q. Now, let me ask you this: When you started for Seattle you knew that there were $12,000 principal with interest from the date of the twelve thousand dollar note in February, 1904, due to Gen. Dodge?

A. Yes, sir; the date I did not know at that time.

Q. Well, from February—you knew it was in February, did you not? A. Yes.

Q. And, as soon as you got there, on June 1st, at least, you learned by telegraph that $5,000 had been paid on that note? A. Yes, sir.

Q. Did you compute the interest to see what the

(Deposition of Frank S. Pusey.)

true amount of principal and interest was on the $12,000 note after crediting the $5,000?

A. No, sir.

Q. The balance due on the twelve thousand dollar note, after crediting the $5,000, was all the money that was owing Gen. Dodge at that time, was it?

A. No, sir.

Q. What other moneys did you know of?

A. The check for $1,500 I knew of that he had personally given.

Q. When was that given?

A. Between February 15th and May 13th.

Q. There was in addition to the twelve thousand dollar note and interest, a check for $1,500?

A. Yes, sir, making it $13,500.

Q. Which you knew of?

A. Yes, sir, bringing up the amount to $13,500.

Q. Do you know where that check for $1,500 was paid?

A. I do not know positively on what bank.

Q. I mean by whom was it drawn?

A. All I can give is what I have been told; this $1,500 was applied to making up the payment to Waterhouse on the ship.

Q. Was the $1,500 check given to Waterhouse?

A. No; it was given to the North Alaska Steamship Company, through the president, Charles B. Smith.

(Deposition of Frank S. Pusey.)

Q. Did you ever see that check or draw it, or have any connection with it?

A. No, sir, not that I recall; I recall only that Gen. Dodge told me he had given it.

Q. Was that part of the debt that he requested you to secure? A. Yes, sir.

Q. And you added to that the lump sum of $1,500 by agreement with Mr. Smith?

A. Yes, sir, to cover any contingent fees that might occur and had occurred.

Redirect Examination by Mr. TAFT.

Q. When you arrived in Seattle on May 29th, there was due to Gen. Dodge in cash $12,000 on his note to the Bowling Green Trust Company, and $1,500, being a check given to the North Alaska Steamship Company as part payment for the steamship "Garonne," making in all $13,500?

A. Yes, sir.

Q. And on June 1st there was credited on the note of $12,000 a payment of $5,000?

A. Yes, sir.

Q. Leaving a balance then due to Gen. Dodge of $8,500 plus interest and incidental expenses?

A. Yes, sir.

Q. And you agreed with Mr. Smith that the interest and these incidental expenses would amount to $1,500? A. Yes, sir.

(Deposition of Frank S. Pusey.)

Q. Making a total of $10,000 for which the note was given? A. Yes, sir.

Q. Now, this note for $12,000 I notice is dated February 15th, 1904. Do you recall the necessity of the North Alaska Steamship Company having that amount of money on that date? A. Yes, sir.

Q. What was it?

A. Under the terms of the telegram sent by Mr. Waterhouse to the North Alaska Steamship Company $1,000 had been paid and $14,000 was to be paid.

Q. On what date?

A. The exact date I cannot give.

Q. Well, was it February 15th?

A. Yes, and for this purpose the money was raised from Gen. Dodge, this $12,000.

Q. In order to make the payment of $14,000 on account of the purchase of the Steamship "Garonne" on February 15th? A. Yes, sir.

Q. Now, in your testimony in regard to the items that go in to make up the $1500, you have not included your own personal services in the matter?

A. No, sir; I said to Smith at the time, covering all legal fees and personal expenses and services on my part.

Q. How much time did you devote to going out to Seattle and returning in connection with this business,—in round numbers, how many days?

(Deposition of Frank S. Pusey.)

A. I presume five or ten days prior to the signing of this original agreement; on May 13th I took hold of the matter and gave it my constant attention, and, through my personal efforts, secured the acknowledgement of the debts on the part of the North Alaska Steamship Company to Gen. Dodge, prior to my going to Seattle.

Q. That is secured by this agreement by which they agree to give you a second mortgage?

A. Yes, sir, and they acknowledged it as a company debt.

Recross-examination by Mr. DEAN.

Q. In regard to the check for $1500, you never saw the check and your knowledge of it is simply what Gen. Dodge told you, as I understand you?

A. I may have seen the check.

Q. But you have no recollection of it?

A. I do not recall—for instance, I could not swear that I saw it.

Q. So that your knowledge in regard to it is simply what Gen. Dodge told you?

A. I am inclined to think that he showed me the check, but I could not say but what it was on his personal statement.

Q. Do you know to whom the check was made payable?

(Deposition of Frank S. Pusey.)

A. I believe to Charles B. Smith.

Q. But you would not undertake to be positive about that?

A. I would not be positive about it.

Q. What knowledge have you that the money that Gen. Dodge advanced was actually applied towards the purchase price of the ship?

A. On the actual statement made to me by Charles B. Smith that all these moneys were applied on the purchase of the ship.

Q. And that is the only knowledge you have of that, is it not?

A. That is the only knowledge I recall at the moment.

Q. You say now you spent several days in getting them to acknowledge this debt to be a debt of the company; where was that done, here in New York?

A. In New York, I brought about this agreement in which is embodied the acknowledgment on their part that it is a company debt.

Q. Well, what question was there ever about its not being a company debt?

A. There was no question about it, but no written evidence.

Q. Whom did you get to acknowledge it was a company debt?

(Deposition of Frank S. Pusey.)

A. The officers of the North Alaska Steamship Company.

Q. Who were they?

A. Mr. Charles B. Smith, President and Mr. Leak.

Q. What office did Mr. Leak hold?

A. Secretary and Treasurer, I believe, and some other officers that were present in the room that I did not know personally. These two men I knew personally.

Q. You know of no meeting of the directors or resolution or anything of that sort, do you, to that effect?

A. Not to my knowledge, except on the part of the attorneys for the company and their statements that this was all done in correct form—McKee & Frost.

Q. McKee & Frost—were they in New York?

A. Yes.

Q. Before you started to Seattle?

A. Yes, that was the 13th of May, 1904.

Q. Now, before you got the acknowledgment that it was the debt of the company, you had nothing to show that it was anything but an individual debt of Mr. Charles B. Smith, did you?

A. I had the personal statements of the officers that it was acknowledged as a debt of the company.

(Deposition of Frank S. Pusey.)

Q. Yes, but I say before you got that acknowledgment from them?

A. I had verbal acknowledgments of the debt from the officers prior to that.

Q. But the note itself which Gen. Dodge endorsed was an individual note of Charles B. Smith, was it not? A. Yes.

Q. And the collateral that was put up, the Ditmar note, was that an individual note of Ditmar, payable to Charles B. Smith individually?

A. Payable to him, I believe, as President of the Steamship Company for stock that Mrs. Ditmar had subscribed for.

Q. Well, do you remember that as a fact?

A. Yes, I remember that—Mr. Smith told me.

Q. Do you know it in any way except that Mr. Smith told you that it was payable to him as President of the company?

A. My recollection is that I saw the note; I did get the note; the note was turned over to me, and my recollection is that it was made to Mr. Smith as President of the steamship company; that is my recollection.

Q. Who turned the note over to you?

A. Mr. Charles B. Smith.

Q. Where?

(Deposition of Frank S. Pusey.)

A. At the office of Gen. Dodge.

Q. When?

A. Prior to my going to Seattle.

Q. And did you take it to Seattle with you?

A. — between the 13th of May and my departure for Seattle.

Q. And did you take it to Seattle with you?

A. No, sir; I took it to the Bowling Green Trust Company for collection, subject to protest.

Q. And you put it there as collateral security?

A. Yes.

Q. So that that note was given by Mr. Smith after Gen. Dodge had signed the $12,000 note?

A. Yes, sir, after I had taken hold of the matter; that was part of my services in this matter; I secured this additional collateral.

Q. What became of that note? Was it returned to Mrs. Ditmar?

A. I do not know; it was paid I know by the North Alaska Steamship Company.

Q. Can you tell who the maker of that note was?

A. Mrs. Ditmar; her initials I do not recall.

A. She lived in New York.

A. She lived in New York?

Q. I think you have spread upon the record the fact that your best recollection is that it was to him

(Deposition of Frank S. Pusey.)

as President of the North Alaska Steamship Company? A. Yes.

Q. But you cannot be positive on that subject?

A. As nearly as I can be without seeing the note.

Q. Then Mr. Charles B. Smith finally agreed to allow you $1500 expenses, a part of which was to pay you for time spent in getting him and his associate officers to admit that it was a corporation debt of the Alaska Steamship Company and not his individual debt; is that a fact?

A. No, sir; that was not the understanding under which he granted the $1500 at all.

Q. Did you take the time that you spent in getting him to make that admission into account in estimating the amount of your expenses?

A. I included simply my time.

Reredirect Examination by Mr. TAFT.

Q. Did the North Alaska Steamship Company ever notify you or Gen. Dodge after June 2d that they had returned the steamship "Garonne" to Waterhouse & Co? A. No, sir.

Q. And the information that you got with regard to the subsequent sale to the Merchants' & Miners' Steamship Company was obtained by casually meeting Mr. Leak on the street, or how?

(Deposition of Frank S. Pusey.)

A. And by going to his office; I went to inquire about the condition of the matters and whether he had heard from Mr. Smith; and he incidentally said at that time that Mr. King had taken the matter in hand and had now purchased the "Garonne."

Q. Do you know whether the original contract of sale by Waterhouse & Co. of the steamship "Garonne," on or about February 3d, 1904, was with Charles B. Smith or with the Alaska Steamship Com-Company direct"?

A. With the Alaska Steamship Company direct—he as one of the officers—the contract was not with Smith personally but between the steamship company and Waterhouse.

Q. Was that the form of the original contract?

A. I do not know; I did not see the original contract.

Q. Who made the sale in the city of New York?

A. Frank Waterhouse & Co. made the sale.

Q. But who was the broker, the man in between?

A. I do not know.

Q. Was it Mr. Ferguson?

A. I do not know; that was prior to my knowledge.

(By Mr. DEAN.) Q. Do you wish to correct your answer to the question "Do you know whether

(Deposition of Frank S. Pusey.)

the original sale by Waterhouse & Co. was to Charles B. Smith personally or with the Alaska Steamship Company direct?''

A. I do not know the direct principals in the sale by Waterhouse or to whom, at that time.

Q. Then you do not wish to go upon the record as saying that you know that the original sale by Waterhouse & Company was to the Alaska Steamship Company, do you?

A. I do not know; I am not familiar with the original contracts drawn up in connection with the sale, as to who the parties were.

Q. I asked you if you wish to correct your answer to Mr. Taft's question, which I repeated in my question.

A. Yes, sir, by correcting it in this way, by saying that I do not know.

(By Mr. TAFT.) Q. This agreement of May 13th 1904, marked ''Complainant's Exhibit 1, Sept. 29, 1905'' sets forth the transactions with Gen. Dodge, by which it shows that he endorsed a note for $12,000, and that the $12,000 went in part payment of the steamship ''Garonne,'' and also a check for $1500, which $1500 was applied as part payment of the balance due on said steamship ''Garonne.'' Are

(Deposition of Frank S. Pusey.)

those statements in that agreement correct statements? A. Yes, they are.

(By Mr. DEAN.) Q. Do you mean to say that you know as a matter of fact that the money was actually paid for the purchase price of the steamship "Garonne"? A. Yes, sir.

Q. Was it not money which Mr. Charles B. Smith used to pay for his stock in the Alaska Steamship Company?

A. No, sir; he told me that all the money raised from Gen. Dodge was applied on the purchase payments to Frank Waterhouse & Co.

Q. That is, the only knowledge you have is what Mr. Smith told you, is it not?

A. And the agreement.

Q. Well, they agreed to that?

A. That admits it.

Q. But you do not know whether that is the actual fact or not, do you?

A. I did not see the transactions.

Q. In fact, it took you something like ten days to get them to admit it, did it not? A. No, sir.

Q. Did they admit it right from the very start?

A. They admitted it from the start, the officers did.

(Deposition of Frank S. Pusey.)

Q. But you only know that to be a fact from the admissions in the writing and from what Charles B. Smith told you?

A. And from their statements to me and from certain officers of the steamship company.

Q. What officers?

A. Mr. Smith and Mr. Leak.

(By Mr. TAFT.) Q. And Mr. Rowe?

A. I cannot swear that he made the statements; those two men made the statements. I had interviews with other officers of the company there, but I did not know them personally; I just met them incidentally that day. They knew of this indebtedness.

(By Mr. DEAN.) Q. What you desire to put upon the record, then, is that your knowledge that the money furnished by Gen. Dodge went to pay for the steamship "Garonne" is what is stated in this writing (Complainant's Exhibit 1) and what Charles B. Smith and Mr. Leak admitted to you or told you?

A. Yes, sir.

(By Mr. TAFT.) Q. You saw the officers of the North Alaska Steamship Company at the office of the company in the early part of May, 1904?

A. Yes, sir.

(Deposition of Frank S. Pusey.)

Q. Was any objection raised by any officer or any person connected with the steamship company that this money, $13,500, about which you have been testifying, was not used in the purchase of the steamship "Garonne"? A. No, sir.

Q. And you were present when negotiations about this agreement of May 13th, Complainant's Exhibit 1, was being prepared. Was there in those negotiations any questions raised at any time that these moneys were not due Gen. Dodge from the North Alaska Steamship Company and had not gone into the purchase price of the steamship "Garonne"?

Mr. DEAN.—I object to the form of the question upon the ground that it calls for a conclusion, and that the witness should state what was said upon the subject.

A. No, sir; on the contrary it was admitted as a company debt.

FRANK S. PUSEY.

Subscribed and sworn to before me this 3d day of September, 1905.

WILLIS VAN VALKENBURG,

Notary Public, Kings Co., Cert. filed in N. Y. Co.

Special Examiner.

Adjourned by consent of counsel to Saturday, September 30th, 1905, at 11 o'clock A. M. for reading and signing the testimony.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc. (a Corporation), and FRANK WATERHOUSE,

Defendants.

Certificate of Special Examiner.

I, Willis Van Valkenburg, special examiner, named in the annexed order, do hereby certify that on the 21st day of September, 1905, at the city of New York, state of New York, I was attended by counsel for the complainant and for the defendants, and that upon the subsequent dates shown by the record herewith returned, I was attended by General Grenville M. Dodge and Frank S. Pusey, as witnesses, who were by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within entitled cause, and gave their testimony, which by consent of counsel and by the respective parties was taken down stenographically in the presence of the witnesses and from their statements, and

that said stenographic notes were afterward reduced to writing by a typewriter, and the testimony as extended was thereafter read over, corrected and signed by said witnesses, respectively. That I herewith return such testimony duly certified to by me, together with seven exhibits offered by the complainant and one exhibit for identification offered by the defendant.

In witness whereof, I have hereunto set my hand and seal this second day of October, 1905.

[Seal] WILLIS VAN VALKENBURG,
Notary Public, Kings Co., Cert. filed in N. Y. Co.
Special Examiner.

[Endorsed]: Depositions. Filed in the U. S. Circuit Court, Western Dist. of Washington. June 21, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Complainant's Exhibit No. 1.

(Sept 29/05. Willis Van Valkenburg, Special Examiner.)

This agreement, made this 13th day of May, 1904, between Charles B. Smith, of the City, County and State of New York, first party, the North-Alaska Steamship Company, incorporated under the laws of the State of New York, hereinafter called "the company," second party, and Frank S. Pusey, as trustee for Grenville M. Dodge, of the City, County and State of New York, third party, Witnesseth:

That whereas, the said Grenville M. Dodge, at the request of the said first party, and for his benefit, has heretofore endorsed a certain promissory note, dated February 15, 1904, made by said first party to the order of the Bowling Green Trust Company, for twelve thousand ($12,000) dollars, payable ninety (90) days from said date, which note is due May 16, 1904, and

Whereas, the proceeds of the above-named note were applied by the said first party in part payment for the steamship "Garonne," now at Seattle, Washington, on a certain contract between Frank Waterhouse, of Seattle, Washington, individually and as president of Frank Waterhouse & Company, Limited, as the sole owner of record of said steamship, and the said first party, and

Whereas, the said contract was thereafter, on February 26, 1904, duly assigned to the North Alaska Steamship Company, the second party hereto, subject to the liability of the said first party to execute to the said Dodge a second mortgage on the above-named steamship, for twelve thousand ($12,000) dollars, as security for the payment of the above-named note at maturity, with interest, costs and expenses, and

Whereas, the said Dodge loaned fifteen hundred ($1,500) dollars to the said first party for
days on March 17, 1904, which was paid by check of said Dodge dated that day, and

Whereas, that particular sum, so received from the said Dodge, was applied as part payment of the balance due on said steamship, and the benefit thereof received and accepted by said Company, and

Whereas, the said Company as assignee of said first party, is not able to deliver the second mortgage to said Dodge prior to the maturity of said above described note for Twelve thousand ($12,000) dollars, for the reason that said Company has not obtained the title papers from said record owner, and

Whereas, the said Company is ready and willing to secure payment of the aforesaid amounts, with interest, costs and expenses, by an assignment of all the freight and passenger moneys now or hereafter due to the said Company as proceeds of the first and second round trips of the said steamship from Seattle, Washington, to Nome, Alaska, and return, in the coming season of 1904, except moneys pledged or assigned as follows:

Date.	Name.	Amount.	, ,Due.
March 21,	John Schick,	$3,600.00,	June 20, 1904.
April 27,	Maria W. Dittmar,	6,000.00	June 1, 1904.
April 28.	Louis L. Browne,	6,000.00	On Demand.
May 7,	Louis L. Browne,	1,500.00	On Demand.
May 11,	S. C. Mead,	3,600.00	July 1, 1904.

Now, therefore, in consideration of the mutual promises herein contained and of other good and

valuable considerations, the parties hereto hereby agree as follows:

The said second party hereby agrees to execute to the said third party, as Trustee for the above-named Grenville M. Dodge, a second mortgage on said steamship "Garonne," for Twelve thousand ($12,000) dollars, as soon as the title deed to the said steamship can be obtained from Frank Waterhouse & Company, Limited, the present record owner, pursuant to the contract of said Waterhouse, individually, and as President of Frank Waterhouse & Company, Limited, with Charles B. Smith, assigned to the above-named Company, present owners, as aforesaid.

The said second party further agrees to execute to the said third party its promissory note for Twelve thousand ($12,000) dollars, payable
days after May 16, 1904, as further security for the payment of the aforesaid note endorsed by said Dodge which is due May 16th, 1904, and as further security for the payment to said Dodge of the Fifteen Hundred ($1,500) dollars loaned by him as aforesaid to the said first party, who applied such sum to the benefit of the said second party.

The said second party agreed to assign, transfer and set over to the said third party, as Trustee, and hereby does assign, transfer and set over all freight and passenger moneys, now or hereafter due the said

Company, or in the said Company's hands and collected by it as proceeds of the first and second round trips of the said steamship "Garonne" from Seattle, Washington, to Nome, Alaska, and return, in the coming season of 1904, except moneys pledged or assigned as above set forth, and to give the said third party an order on the said Company's agent at Seattle, Washington, for the payment of said moneys, as collected.

It is understood and agreed that the said Company shall pay any interest due on the said Fifteen ($1,500) hundred dollars to date, or that may hereafter accrue, together with any interest due or that may hereafter accrue on said note for Twelve thousand ($12,000) dollars, with costs and expenses.

It is further understood and agreed that if the said third party waives his right hereby created to collect any portion of said moneys out of the proceeds of the said first or second trips, then this agreement shall extend to and bind all the parties hereto as to subsequent trips of said steamship until said notes, with interest, costs and disbursements are fully paid.

In witness whereof the parties hereto have hereunto affixed their hands and seals this 13th day of May, 1904, and the said Company has signed its name hereto by its President, attested by its Secre-

tary, and has affixed its corporate seal hereto on the same day.

CHARLES B. SMITH, [Seal]
NORTH-ALASKA STEAMSHIP CO.
[Seal]
By CHARLES B. SMITH, Pres.
Attest: JOHN B. LEAKE, Treas.

Complainant's Exhibit 2.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

$10,000.00 Seattle, Wash., June 2d, 1904.

On or before two months after date we promise to pay to the order of Frank Waterhouse & Co. Inc. as Trustee the sum of Ten Thousand & 00/100 Dollars, with interest at the rate of seven per cent, per annum from date. Negotiable and payable at the Seattle National Bank, Seattle, Wash. If suit is brought on the note or it becomes advisable to place the same in the hands of an attorney for collection, we agree to pay an additional sum equal to five per cent upon the amount of this note as an attorneys fee.

NORTH-ALASKA STEAMSHIP CO.
By CHARLES B. SMITH,
President.

Complainant's Exhibit 3.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

Memorandum between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co. Inc., of Seattle, Washington.

The North Alaska Steamship Company is indebted to said Waterhouse & Co. Inc. in the sum of about $37,671.46 being balance due on purchase price of the Steamship "Garonne," and are also indebted to said G. M. Dodge in the sum of about Ten Thousand Dollars for borrowed money.

It is agreed that said Waterhouse & Co. Inc. shall take a mortgage from said North Alaska Steamship Co. upon the Steamship "Garonne" to secure both claims above mentioned. The claim of said Waterhouse & Co. Inc. shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co. Ins. shall take a note from said North Alaska Steamship Co., payable to them as Trustee, for the amount so owing to said Dodge, said note to be payable in two months from date.

It is agreed that said Waterhouse & Co. Inc., in acting as such Trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever

with reference thereto, except that it agrees to act in good faith.

FRANK S. PUSEY,
Agent For G. M. DODGE.
FRANK WATERHOUSE & CO., Inc.,
By FRANK WATERHOUSE,
President.

Complainant's Exhibit 4.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

To all to Whom these Presents Shall Come, Greeting:

Know ye, that we, North Alaska Steamship Company, a corporation, of the State of New York, are held and firmly bound unto Frank Waterhouse & Co. Inc., of Seattle, Washington, in the just and full sum of $37,671.46 Dollars; for the payment of which sum, well and truly to be made, we hereby bind ourselves, our successors and assigns, by these presents.

Dated at Seattle, Wash., this 2d day of June, A. D. 1904. Whereas, said North Alaska Steamship Co. is justly indebted to said Frank Waterhouse & Co. Inc., for balance of purchase price of the Steamship hereinafter described in the sum of $37,671.46 Dollars, evidenced by the two promissory notes of said North Alaska Steamship Co., payable in equal installments to said Frank Waterhouse & Co. Inc.,

for said last named sum, with interest at the rate of 7 per cent per annum from date until paid, said notes bearing even date herewith, and being payable June 22 and July 12, respectively, after date at Seattle National Bank, Seattle, Wash., and, whereas, said North Alaska Steamship Co., is further indebted to Frank Waterhouse & Co. Inc., as trustee in the sum of Ten Thousand Dollars, evidenced by its promissory note of even date herewith, payable two months after date to said Frank Waterhouse & Co. Inc., as trustee, at Seattle, Wash., with interest at the rate of 7 per cent per annum from date until paid; said sums being charged on the body, tackle, and appurtenances of the good ship "Garonne," of the burden of 2,319 tons, the said North Alaska Steamship Co. being the sole owner of said ship.

Now the condition of this obligation is, that if the said North Alaska Steamship Co. shall pay, or cause to be paid, to the said Frank Waterhouse & Co. Inc., the said sum of $37,671.46 Dollars, evidenced by the notes above specified, and also to said Frank Waterhouse & Co. Inc., as trustee the said further sum of Ten Thousand Dollars, as evidenced as above stated, with interest on said sums according to the tenor of said notes, then this obligation to be void; otherwise; to be and remain in full force and effect.

And in consideration of, and as security for, said moneys so owing as aforesaid, the said ship "Ga-

ronne," her tackle, machinery, furniture, apparel and, equipment is; by these presents, assigned pledged, mortgaged, set over and conveyed to the said Frank Waterhouse & Co., Inc., its successors and assigns, the certificate of the registry of which ship is as follows, viz:

Register No. 108 Permanent Official Number

Numerals.	Letters.
86504	K. P. T. W.

Certificate of Registry.

In pursuance of Chapter I, Title XLVIII, "Regulation of Commerce and Navigation, "Revised Statutes of the United States, W. P. Prichard, Secy. of Frank Waterhouse Co. Inc., R. McFarland, Master, having taken and subscribed the oath required by law, and having sworn that he, The Frank Waterhouse & Company, Inc., is the only owner of the vessel called the "Garonne" of Seattle, Washington, whereof R. McFarland is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1871, at Govan, Scotland, as appears by P. R. No. 48 B issued at Seattle, Washington, May 12th, 1900, surrendered O. C. and said register having certified that the said vessel has four decks, and three masts; and that her length is 371 feet and——tenths; her breadth 41 feet and 4 tenths; her depth 20 feet

and 4 tenths; her height 15 feet and 8 tenths; that she measures Twenty Three Hundred Nineteen.

	Tons	100ths.
Capacity under tonnage deck.....	1938	19
Capacity between decks above tonnage deck	1962	93
Capacity of inclosures on the upper deck, viz:	44	54
Gross Tonnage....	3954	

Deductions under Section 4153, Revised Statutes, as amended by Act of March 2, 1895:

Crew space 233.79; Master's cabin	233:79	
Steering gear; Anchor gear 46.62	117:74	
Boatswain's stores 71.12; Chart-house		
Storage of sails, 12.03;.....		
Donkey-engine and boiler; Propelling Power 1262.61	1274:64	
Total Deductions	1626 17	1626 17
Net Tonnage	2319	

The following described spaces, and no others, have been omitted, viz: and that she is a Str. Sc (iron), has a figure-head and a elliptic stern; and the said having agreed to the descrip-

tion and admeasurement above specified, according to law, said vessel has been duly registered at the Port of Port Townsend, Wash.

Given under my hand and seal at the Port of Port Townsend, this 4th day of May, in the year one thousand nine hundred and one (1901).

No (Seal) F. D. HEUSTIS, (Seal)
Collector of Customs.

EUGENE TYLER CHAMBERLAIN,
Commissioner of Navigation.

Formerly Br. SS. "Garonne," Re-measured at Seattle, Wash. 1900.

It being mutually understood and agreed that, in case said indebtedness, or any part thereof, according to the terms of said notes, shall remain due and unpaid after the maturity of either of said notes; then all of said notes shall be considered due and payable at the option of said Frank Waterhouse & Co., Inc., and said Frank Waterhouse & Co., Inc., may foreclose this mortgage according to law, or at their election may take possession of said ship, tackle, apparel, machinery, furniture and equipment, and sell the same at public auction, in order to satisfy what may then remain due, without any proceedings in court or otherwise for the purpose of authorizing such sale, and thereupon may execute and deliver a sufficient bill of sale to transfer completely to any purchaser or purchasers all title and

property in and to said ship, her tackle, apparel, furniture, machinery and equipment; and out of the proceeds of such foreclosure or of such sale, said Frank Waterhouse & Co., Inc., shall pay, first, all expenses connected with or incurred in such foreclosure or sale, including an attorney's fee of five per cent upon the amount then remaining unpaid on said notes for advice and services of their attorney in connection with such foreclosure or sale; second, the full amount then remaining unpaid on said notes of $37,671.46, payable to said Frank Waterhouse & Co., Inc., if such proceeds shall be sufficient to pay said note in full, and if not sufficient to pay said note in full, then apply thereon all of such proceeds in their hands; and, third, after paying such expenses and the full amount due on said notes to Frank Waterhouse & Co., Inc., the residue, if any, or a sufficiency thereof, shall be applied in payment of such amount as may remain unpaid on said note for $10,000.00 payable to Frank Waterhouse & Co., Inc., as trustee; and, fourth, any balance of such proceeds after making the payments above provided for shall be turned over to said North Alaska Steamship Company, its successors or assigns.

And before making such sale as aforesaid, said Frank Waterhouse & Co., Inc., shall give fifteen days' notice of the time, place and terms of said sale, such notice to be given by publication in some newspaper

published in Seattle, Wash., at least twice a week for two weeks. And it is expressly agreed and covenanted that said Frank Waterhouse & Co. Inc., may become bidders at such sale and may become purchasers thereat if they have the highest bid.

And it is further agreed that in case of such sale, said North Alaska Steamship Co., mortgagor, its successors and assigns, shall whenever thereto requested, make, execute and deliver to such purchaser or purchasers another bill of sale of said ship, her tackle, apparel, furniture, machinery and equipment, in which the registry of said ship shall be recited, for transferring completely to such purchaser or purchasers all the rights, interests, and claims of said mortgagor, its successors and assigns, as owners of said ship. And in default of the prompt execution and delivery of such other bill of sale to such purchaser or purchasers by the said mortgagor, its successors and assigns, when thereto requested, W. P. Prichard, of Seattle, Wash., is hereby constituted and appointed the legal attorney of the said North Alaska Steamship Co., mortgagor, for the purpose of making, executing and delivering such bill of sale; and the said North Alaska Steamship Co. hereby ratifies and confirms the act of the said W. P. Prichard, as their attorney for said purpose.

And it is hereby further agreed, that insurance shall be made at some agency in Seattle, Wash., on the said ship, her tackle, etc., for the security of the

said mortgagee, to an amount not less than the aggregate of said promissory notes as aforesaid, and said mortgagee is hereby authorized to procure such insurance at the expense of said mortgagor, if not seasonably obtained by said mortgagor, the amount so advanced by said mortgagee to be secured by this mortgage.

It is further agreed and understood that the said indebtedness evidenced by the said notes to Frank Waterhouse & Co. Inc., for $37,671.46 shall be and is a first, prior and paramount claim secured by this mortgage, and the said indebtedness evidenced by said note to Frank Waterhouse & Co. Inc., as trustee for $10,000.00, is a second claim and subordinate to said first described note under this mortgage. In testimony Whereof, The said North Alaska Steamship Company has hereunto set its hand and corporate seal, in execution hereof, by its president and secretary on this the Second day of June, A. D. 1904.

NORTH ALASKA STEAMSHIP COMPANY,

By ————————,
President.

By ————————,
Secretary.

Signed, sealed and delivered in presence of as to said ————

————————

as to said ————

State of Washington,
County of King,—ss.

I, ————, a Notary Public in and for the State of Washington, residing at Seattle, in the above-named county and state, duly commissioned, sworn and qualified, do hereby certify that on this 2d day of June, A. D. 1904, before me personally appeared ———Smith, to me known to be the individual who as president of the North Alaska Steamship Company, the corporation that executed the within instrument, and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and on oath stated he is authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal this 2d day of June, A. D. 1904.

————————,
Notary Public in and for the State of Washington,
Residing at Seattle, King County, said state.

Complainant's Exhibit No. 5.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

(On Blank of Western Union Telegraph Co.)

July 15, 1904.

Frank Waterhouse, Seattle, Washington.

Have you advices of collection of trustee freight money. Just returned yesterday. Please write present status of our joint claim.

FRANK S. PUSEY.

Copy.

Complainant's Exhibit No. 6.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

No. 1 Broadway, New York. July 27, 1904.

Mr. Frank Waterhouse, Seattle, Washington.

Dear Sir: Some two weeks ago I wired you to learn if freight money had been collected, and to write me present status of affairs, to which I have no reply. Not hearing from you, I learned through Mr. King that have disposed of the S. S. Garonne to an new company. If you have taken care of my claim of $10,000, under your agreement to act in good

faith in acting as Trustee, it will relieve my mind very much to hear from you to that effect.

Very truly,

F. S. PUSEY,

Trustee.

Complainant's Exhibit No. 7.

(Sept. 29/05. Willis Van Valkenberg, Special Examiner.)

STATE OF NEW YORK.

OFFICE OF THE SECRETARY OF STATE.

Albany, Apr. 15, 1905.

Taft & Sherman, 15 William St., N. Y. City.

Dear Sir: Your letter of the 13 inst. is received. In reply thereto I respectfully state that a certificate of incorporation was filed in this office on the 12 day of July, 1904, of a company under the corporate name of Merchants and Miners Steamship Co. of New York.

A certified copy of said certificate can be furnished upon receipt of $———.

Yours respectfully,

Incorporators A. J. Baldwin, F. M. Van Wagoner, E. W. Ulman, F. A. Clary.

JOHN F. O'BRIEN,

Secretary of State.

For Identification, Defendant's Exhibit "A."

(Willis Van Valkenberg, Special Examiner.)

Seattle, Washington,
June 2d, 1904.

I so hereby agree to hold out and deposit Five Thousand Dollars ($5,000.00) of the freight money collected from first voyage of S. S. Garonne upon its arrival at Nome, Alaska, with the Bank of Nome to the credit of Seattle Nat'l. Bank for use of Frank Waterhouse & Co. Inc., Trustee.

CHARLES B. SMITH.

United States Circuit Court, Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & COMPANY Inc., (a Corporation), and FRANK WATERHOUSE,

Respondents.

Memorandum Decision on the Merits.

(Filed May 14, 1907.)

I am unable to find in the pleadings and evidence in this case any legal or equitable grounds for holding the defendant Frank Waterhouse as an individual liable to the complainant, and I therefore direct that as to him the case be dismissed with costs.

The other defendant, Frank Waterhouse & Co., Incorporated, will hereafter be referred to as the defendant, as if it were the sole defendant in the case. It was formerly the owner of the steamship Garonne, and in the year 1904 it contracted to sell said steamship to the North Alaska Steamship Company, another corporation, which appears to have been organized without any capital other than the hopes of its promoters. In the month of June, 1904, the purchaser owed the defendant $37,671.46 on account of the purchase price of the steamer, and owed the complainant $10,000.00 for borrowed money, and also other creditors a considerable amount for repairs and betterments made to the steamer, and supplies for an intended voyage from Seattle to Nome.

On June 2, 1904, in order to arrange for the payment of the steamship company's debts to the defendant and to the complainant, and to clear the ship so she could proceed immediately on her intended voyage, the three parties, represented respectively by

Frank S. Pusey, agent for the complainant, Frank Waterhouse, President of the defendant, and Charles B. Smith, President of the Steamship Company, held a conference at Seattle, which culminated in the execution and delivery of a memorandum agreement, a promissory note and an assignment of freight money, which several documents are of the following tenor:

"Memorandum between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co. Inc., of Seattle, Washington.

The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about $37,671.46 being balance due on purchase price of the Steamship "Garonne," and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money.

It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Co. upon the steamship "Garonne" to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steamship Co., payable to them as Trustee, for the amount so owing to said Dodge, said note to be payable in two months from date:

It is agreed that said Waterhouse & Co., Inc., in acting as such Trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

FRANK S. PUSEY, Agent,
For G. M. DODGE.
FRANK WATERHOUSE & CO., Inc.,
By FRANK WATERHOUSE,
President.

$10,000.00

Seattle, Wash., June 2d, 1904.

On or before two months after date we promise to pay to the order of Frank Waterhouse & Co., Inc., as Trustee the sum of Ten Thousand & 00/100 Dollars, with interest at the rate of seven per cent. per annum from date, negotiable and payable at the Seattle National Bank, Seattle, Wash. If suit is brought on this note or it becomes advisable to place the same in the hands of an attorney for collection, we agree to pay an additional sum equal to five per cent., upon the amount of this note as attorney's fees.

NORTH ALASKA STEAMSHIP CO.,
By CHARLES B. SMITH,
President.

Seattle, Washington,
June 2d, 1904.

I do hereby agree to hold out and deposit Five Thousand Dollars ($5000.00) of the freight money collected from first voyage of S. S. Garonne upon its arrival at Nome, Alaska, with the Bank of Nome to the credit of Seattle Nat'l Bank for use of Frank Waterhouse & Co., Inc., Trustee.

CHARLES B. SMITH.

A mortgage of the steamship Garonne was also prepared and signed by Smith, as President of the Steamship Company, containing stipulations in conformity with the above memorandum, and upon these several documents this suit is founded.

The following quotations from the defendant's answer are proximately a true statement of the transaction and the controlling circumstances which influenced the parties:

"That on June 2d, 1904, there was a balance due respondent company on said purchase price from said North Alaska Steamship Company of $37,671.46; that said steamer was loaded with cargo and passengers ready to start on her voyage to Nome, Alaska; that the representative of said North Alaska Steamship Company reported to respondent company that there were claims unpaid against said steamer for repairs and supplies amounting to approximately thirteen thousand dollars ($13,000.00). That said North Alaska Steamship Company had failed to furnish a guarantee bond guaranteeing said vessel would be kept free of liens and they had failed to furnish

the collateral security for said deferred payments according to the terms of their contract, and stated to respondent that they were unable to furnish such security; and respondent company had notified them that said vessel would not be permitted to sail under their charge until said contract was complied with in full. That on or about June 1st, 1904, one Charles B. Smith, President of said North Alaska Steamship Company, arrived in Seattle from New York expecting to go to Nome, Alaska, on said steamer, and one Frank S. Pusey representing himself as the agent of said complainant, also arrived in Seattle about the same date. That said Smith represented to respondents that his company was prepared to pay off all of the claims against said vessel incurred by repairs and supplies as soon as he could notify the New York office of the amount due therefor; and that they were prepared to pay the balance due respondent company in the purchase price within the next twenty days; and in view of said representations and relying thereon, this respondent company consented to permit said steamer to make said voyage in charge of said North Alaska Steamship Company; that said Smith and said Pusey agree that said North Alaska Steamship Company was indebted to said complainant, in the sum of ten thousand dollars ($10,000.00), and said Smith, on behalf of his said company, offered to take a bill of sale to said steamer and to execute a mortgage thereon for the balance

due respondent company, payable in twenty (20) and forty (40) days from that date, and to give a second mortgage to said complainant to secure the ten thousand dollars ($10,000.00) due him, payable in sixty (60) days from that date; said bill of sale and mortgages to be executed by said company as soon as the money was received by respondent company with which to pay the claims for labor and supplies against said steamer; that said Smith also agreed with said Pusey to assign to him, and on behalf of said North Alaska Steamship Company did assign to said Pusey certain freight due on cargo then being shipped by said steamer to Nome, which was payable on delivery of the cargo at Nome, and said Pusey appointed said Smith as agent to collect said freights and remit them to the Seattle National Bank for the credit of said complainant. That as a matter of convenience it was agreed between the said Pusey and the said respondent company that one mortgage would be taken on said vessel securing both claims due said respondent company and due said complainant, said mortgage providing for priority in favor if the debt due respondent company; that said Pusey stated to respondents that he did not wish to remain in Seattle for the length of time necessary to get said mortgage executed by said North Alaska Steamship Company, and requested respondent company to act for him in receiving such money as might

be remitted by said Smith to said Seattle National Bank for the credit of complainant, and in the acceptance and recording of said mortgage; and the respondent company as a matter of accommodation to said Pusey consented to do so; and the memorandum set forth in the sixth paragraph of said bill of complaint was executed to evidence said arrangement.

Respondent further shows that it was agreed that the note to said complainant should be executed by said North Alaska Steamship Company payable to this respondent as trustee for said complainant in order that the same might be deposited in the Seattle National Bank and any remittances received by said bank from said Smith could be credited thereon. * * *

Respondent states that in the transactions and conversations with said Pusey leading up to said final arrangement, the said Pusey was distinctly informed of the rights of this respondent and the conditions as they existed at that time between it and said North Alaska Steamship Company. * * * Respondents state that said North Alaska Steamship Company was a New York corporation, and had its main office and corporate seal in the State of New York, and that all of its officers except the said Charles B. Smith, who was president, were then in New York. That respondent company caused to be

prepared a bill of sale of said steamer from respondent company to said North Alaska Steamship Company, and also caused to be prepared a mortgage from said North Alaska Steamship Company to respondent company upon said steamer, with appropriate conditions and provisions to secure the debt due this respondent company, and also that due complainant in accordance with the terms agreed on. That said mortgage was submitted to said Pusey and declared by him to be satisfactory in form; that thereupon respondent company procured said Charles B. Smith, president of said North Alaska Steamship Company, to sign said mortgage for and on behalf of said company, and also to execute the notes upon behalf of said company. * * * That accordingly this respondent company, on June 3d, 1904, enclosed said bill of sale and said mortgage to the Chase National Bank of New York, with directions to said bank to deliver said bill of sale to said North Alaska Steamship Company upon the proper execution of said mortgage by that company, and on the same day respondent company notified J. B. Leake, the secretary of said company, and also the Occidental Security Company, the financial agent of said company in New York, of the forwarding of said papers, and requested prompt execution thereof. That said North Alaska Steamship Company failed and refused to execute said mortgage and refused to pay

the claims incurred by it against said steamship company for repairs and supplies. * * * Respondents state in answer to the allegations contained in the ninth paragraph of said bill of complaint that said steamship "Garonne," on June 2d, 1904, was in first-class condition, and respondent believes that she was thoroughly seaworthy, and they state that the overhauling and repairs made thereon by said North Alaska Steamship Company were charged and done on the credit of this steamer."

The North Alaska Steamship Company having failed to meet its obligations for repairs, etc., the defendant corporation disregarding the arrangement made at Seattle with the complainant's representative served a written notice upon the officers of the North Alaska Steamship Company in New York, which reads as follows:

"New York, July 8th, 1904.

North Alaska Steamship Company,

Gentlemen: By the terms of our conditional contract of sale of the steamship 'Garonne' to you it was provided that deferred payments should be evidenced by notes of your company and secured by a first mortgage on the steamer and by such additional collateral security as should be satisfactory to us. It was also further provided that your company should give us a guaranty company's bond, protecting us and the steamer from any lien or

claims for supplies or repairs that might be incurred by you at any time before the payment of our debt in full. It was also provided in said agreement that these securities and bonds were to be furnished to us on or before the tenth day of March, 1904. None of these conditions have been complied with by you.

There is now a balance due us of $37,641.00, with interest since June 2d, 1904, and there are claims and demands outstanding against the steamer, incurred by you in the purchase of supplies and material and for repairs, amounting to something over $30,000, which are unpaid and for which the holders claim a lien against the steamer.

We now notify you that unless you are prepared to and will at once complete the performance of your contract by accepting title to the steamer, executing a mortgage and notes for the deferred payments, furnish the bond from the Guaranty Company, indemnifying us against any claims against the steamer, and furnish the additional collateral security for preferred payments due us, that security to be to our satisfaction, we will exercise the right reserved to us under the contract of cancelling your option of purchasing the said steamer and declare a forfeiture of any rights you would otherwise have in said contract, and also will retain the payments heretofore made to us thereon.

We are now, and have been since the tenth day of March, last, ready and prepared to execute a bill of sale to you of the steamer upon your compliance with the terms of said contract, but we are not willing to allow the matter to stand open in its present shape, and we require that you either perform the contract or submit to a forfeiture of your rights under it at once.

Yours truly,
FRANK WATERHOUSE & CO."

The response was a notice that said steamship company was unable to comply with the terms of said demand, and that it abandoned the contract to purchase the steamship, and thereupon the president of the defendant corporation entered into the following written contract with Wm. F. King, who had been a financial backer of the steamship company:

"Memorandum of Agreement made this 9th day of July, 1904, between Wm. F. King, of New York City, party of the first part, and Frank Waterhouse, of Seattle, Washington, party of the second part.

For and in consideration of the mutual covenants and agreements hereinafter expressed, the said parties mutually agree as follows:

First, The said Wm. F. King, acting for both parties, will at once organize a corporation under the

laws of the State of New York, to be known as the Merchants' and Miners' Steamship Company of New York, with a capital stock of one hundred thousand dollars ($100,000.00), such corporation to have all the powers usual and common to transportation companies. The Board of Directors shall be composed of five members, and the board for the first year shall consist of the following persons: William F. King, Wm. R. Corwine and S. Cristy Mead, of the City of New York, and Frank Waterhouse and W. H. Bogle, of the city of Seattle. For the first year the president shall be Frank Waterhouse, the vice-president W. H. Bogle, and the secretary S. C. Mead. The said Wm. F. King is to receive fifty thousand dollars par value of the capital stock, and the said Frank Waterhouse is to receive the other fifty thousand dollars par value of the capital stock.

Second. Upon the formation of said corporation, said Waterhouse will have Frank Waterhouse & Co., Inc., execute a bill of sale conveying to said new company the steamship "Garonne," with her equipment, supplies and material on board, and also turn into the treasury of said company the cash in the hands of Frank Waterhouse & Co., Inc., received from the last voyage of the "Garonne."

Third. The said Wm. F. King will advance to said new company the sum of thirty thousand dol-

lars ($30,000.00) in cash, to be applied in the payment and discharge of the claims now existing against the steamship for supplies, material, repairs, etc., said money to be deposited by said King in the Chase National Bank, New York, to the credit of Frank Waterhouse, fifteen thousand dollars ($15,000.00) thereof, on or before July 16th, 1904, and the remaining fifteen thousand dollars ($15,000.00) on or before July 23d, 1904.

Fourth. Said new company shall execute a mortgage securing to said Wm. F. King the said sum of thirty thousand dollars ($30,000.00), and to said Frank Waterhouse & Co., Inc., the sum of thirty-seven thousand dollars, with interest on said amounts from July 15th, 1904. Said mortgage to contain the usual covenants and agreements contained in such instruments, but to provide specifically against any personal liability or stock liability of either of the parties hereto for any part of the indebtedness expressed in said mortgage. Said indebtedness to be represented by notes given by said mortgagor company to said respective parties as above, and each of the notes to be of equal rank under the mortgage, and to be payable at such time or times as said parties hereto may hereafter agree, and to bear interest at the rate of 6% per annum.

Fifth. Said Waterhouse shall advance to said new company such amount as may be needed for the

operation of the steamer during the present season.

Executed in duplicate the date above named.

WM. F. KING.

FRANK WATERHOUSE."

The scheme outlined in this agreement was subsequently carried through to completion, and on the same day that said agreement was entered into, the defendant executed a release to the North Alaska Steamship Company, forever discharging it "of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, expense, executions, claims, or demands whatsoever in law or in equity, which against the North Alaska Steamship Company, its successors and assigns, ever had, now has, or which its successors and assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents." A similar release was given to the defendant by the steamship company, and the defendant also agreed to relinquish the freight money assigned by Smith, the president of the steamship company to the defendant as trustee for the complainant. The exchange of releases and relinquishment are proved by the testimony of Mr. Bo-

gle given in behalf of the defendant and by a copy of the release executed by the defendant, which was introduced in connection with his testimony as "Defendant's Exhibit Q-3."

These transactions were carried through to completion at the city of New York without any notice being given to the complainant. In its answer and in the evidence introduced in behalf of the defendant there is an attempt to excuse its failure of duty in this regard on the ground that its officers did not know the address or whereabouts of the complainant. From the testimony of Waterhouse and Bogle it appears that the only efforts made to communicate with the complainant were confined to inquiries directed to persons connected with the steamship company, whose interests would not have been advanced by affording him a fair opportunity to see to the enforcement of his rights in connection with the adjustment made between the two corporations. This shows inexcusable negligence on the part of a trustee. The evidence proves that the complainant is and has been for many years a man of national reputation and at the time of the transactions he had an office in New York City, which he visited frequently and when absent therefrom, he was but a short distance from New York City, and was in constant communication with his office. I have no doubt that any ten year old boy of ordinary intel-

ligence, if dispatched with a message, could have readily delivered it to the complainant in person, and that Mr. Frank Waterhouse, if he had made a bona fide effort to do so, could have communicated with the complainant by mail, telegraph or telephone, or personally.

It is the contention of the complainant that the steamship "Garonne" in the year 1904 was of sufficient value to constitute ample security for the entire indebtedness of the North Alaska Steamship Company, including the unpaid purchase money, the debts contracted for repairs, improvements and supplies, and the debt due to him, and that the disposition made of the ship without collecting said debt constitutes a breach of trust rendering the defendant corporation liable to him for the entire amount of said debt. The defense appears to rest upon a theory, that the North Alaska Steamship Company acquired no interest in the ship other than an option to purchase, and that the defendant corporation incurred no liability to the complainant, except to hand over any amount of money which might be voluntarily paid by the steamship company under the contract of June 2d, 1904. In this it is assumed that the steamship company was not a party to that contract, and was not obligated to mortgage the steamship to secure the money due to the complainant. I hold, however, that the mort-

gage which was signed by the president of the steamship company, the promissory note for ten thousand dollars, given to the defendant as trustee for the complainant, the assignment of freight money, and the contract signed by the defendant and Pusey as agent for the complainant, constitute one contract, binding upon all three of the parties. The documentary evidence in the case proves that notice of the transaction was promptly sent to the Secretary of the steamship company in New York, and that Smith's authority as president of the company was not disputed. The evidence also proves that there was more than a mere executory contract to sell the steamship to the North Alaska Steamship Company, because the sale was consummated by complete manual delivery of the ship to the purchaser, and she was permitted to leave the port of Seattle under the control of the purchaser in consideration of said contract, and that she earned money for the purchaser; therefore, the defendant, held the legal title, subject to the trust created by said contract, and except as against other creditors and bona fide purchasers the ship was effectually and legally hypothecated for the complainant's debt.

The evidence proves that the "Garonne" was surrendered to the defendant in good condition, and that she was then worth more than the amount of the complainant's debt over and above all other

claims against her. The defendant was then in the same situation, practically, that it would have been if the mortgage had been executed and foreclosed and the ship sold to the defendant for the amount of the debts secured by the mortgage, and the manner in which she was disposed of by the defendant without notice to the complainant was incompatible with the good faith, to which the defendant as trustee for the complainant became pledged by its agreement with Pusey. The evidence also proves that the release given by the defendant while it was the holder of the ten thousand dollar note, included the debt evidenced by that note and discharged the North Alaska Steamship Company, from its indebtedness to the complainant, to the extent of the power of a trustee, under the circumstances, and by discharging the steamship company in that manner and disposing of the security without the complainant's consent, the defendant, by the principles of equity, must be held to have assumed an obligation to pay the note.

In the argument in behalf of the defendant it was contended that the North Alaska Steamship Company should have been joined as a necessary party to the suit, and that because of a defect of parties the Court cannot render a decree, other than a decree of dismissal. If it were true that the steamship company is a necessary party, the Court would be obliged to dismiss the suit, notwithstanding the fail-

ure of the defendant to set forth this ground of objection to the bill of complaint, by demurrer, plea or answer. The defendant, however, by the introduction of the release in evidence has proved affirmatively that the steamship company is not a necessary, nor a proper party, it has no interest to be affected by the litigation, because the release is an estoppel against any reclamation by the defendant against it.

I direct that a decree be entered in favor of the complainant for the amount of the principal and interest of the promissory note, and the amount specified in the note for attorney's fee.

C. H. HANFORD,
Judge.

[Endorsed]: Mem. Decision on the Merits. Filed May 14, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Respondents.

Final Decree.

This cause coming on to be further heard at this term, and after argument by counsel, and the Court being fully advised in the premises; wherefore, upon consideration thereof it is hereby ordered, adjudged and decreed as follows, viz.:

1st. That this action is, and the same hereby is dismissed as to the respondent, Frank Waterhouse, and that said Frank Waterhouse do have and recover of and from the complainant his costs in this action hereby allowed by this Court as follows: A docket fee of twenty dollars ($20.00) and twenty-five (25) per cent of the aggregate amount of the costs of complainant and respondent, Frank Water-

house & Co., Inc. (less said $20 docket fee), as taxed and allowed by the clerk of this Court.

2d. That said complainant, Grenville M. Dodge, do have and recover of and from the respondent, Frank Waterhouse & Co., Incorporated, the sum of ten thousand dollars ($10,000.00), together with interest thereon at the rate of seven per cent per annum from June 2, 1904, to date of this decree amounting in the aggregate to the sum of twelve thousand and seventy-six and 67/100 dollars ($12,076.67), also five (5) per cent of the amount of said principal and interest, as an attorney's fee, amounting to the further sum of six hundred and three and 80/100 dollars ($603.80); and said complainant's costs and disbursements herein incurred, as taxed and allowed by the clerk of this court, amounting to the further sum of ($285.73) dollars.

3d. That upon application of said complainant, or his solicitor, execution issue out of this Court, and under the seal thereof, against said respondent, Frank Waterhouse & Co., Incorporated, for the amount of this decree, including attorney's fee and costs, as aforesaid.

Done in open court, this 20th day of May, 1907.

C. H. HANFORD,

Judge.

[Endorsed]: Final Decree. Filed in the U. S. Circuit Court, Western Dist of Washington. May 20,

1907. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Respondents.

Supersedeas and Appeal Bond.

Know all men by these presents, that we, Frank Waterhouse & Company, Incorporated, as principals, and National Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the above-named Grenville M. Dodge, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 1st day of June, 1907.

Whereas, the above-named Frank Waterhouse & Company, Incorporated, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States for the Western District of Washington;

Now, therefore, the condition of this obligation is such that if the above-named Frank Waterhouse & Company, Incorporated, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

FRANK WATERHOUSE & COMPANY, Inc.

By W. P. PRICHARD, [Seal]
Secretary.

NATIONAL SURETY COMPANY.

By JOHN W. ROBERTS,
Resident Vice-president

Attest: GEO. W. ALLEN,
Resident Assistant Secretary.

Approved June 6th, 1907.

C. H. HANFORD,
Judge.

[Endorsed]: Supersedeas and Appeal Bond. Filed in the U. S. Circuit Court, Western Dist. of

Washington. June 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Respondents.

Petition for Appeal.

The above-named respondent, Frank Waterhouse & Co., Inc., conceiving itself aggrieved by the final decree entered on the 21st day of May, 1907, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this appeal may be allowed, that the amount of the supersedeas bond to be executed by said respondent on such appeal may be fixed by the Court, and that a transcript of the records, proceedings and papers in said cause, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit.

BOGLE, HARDIN & SPOONER,

Solicitor for Respondent, Frank Waterhouse & Co., Inc.

[Endorsed]: Appeal. Filed in the U. S. Circuit Court, Western Dist. of Washington. June 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,

Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,

Respondents.

Order Allowing Appeal.

It is ordered that the appeal of Frank Waterhouse & Co., Inc., from the final decree entered in this cause on the 21st day of May, 1907, be allowed as prayed for, and that the amount of the supersedeas bond to be executed by such appellant to

supersede said decree pending said appeal be, and the same is hereby, fixed at the sum of fifteen thousand ($15,000) dollars.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the U. S. Circuit Court, Western Dist. of Washington. June 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the United States Circuit Court of Appeals, Ninth Circuit.

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE,
Complainant and Appellee.
FRANK WATERHOUSE,
Defendant.

Assignment of Errors.

Comes now Frank Waterhouse & Co., Inc., by Bogle, Hardin & Spooner, its solicitors, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The suit is brought to charge this appellant, as trustee, with an indebtedness alleged to be owing

by the North Alaska Steamship Company to the complainant and appellee, Grenville M. Dodge. In such proceedings the debtor, North Alaska Steamship Company, was an indispensable party, and the Court below erred in entertaining jurisdiction of such cause in the absence of the North Alaska Steamship Company from the record.

II.

The Court below erred in rendering a decree in favor of the appellee, Grenville M. Dodge, and against this appellant for the sum of twelve thousand and seventy-six and sixty-seven hundredths ($12,076.76) dollars, and for the further sum of six hundred and three and eighty hundredths ($603.80) dollars as attorney's fee, together with interest and costs.

III.

The Court erred in rendering any decree in favor of complainant below and against this appellant, and in refusing to enter a decree in favor of this appellant dismissing said action.

IV.

And for other errors manifest upon the record.

Wherefore, the said Frank Waterhouse & Co., Inc., prays that the decree of the said Circuit Court of the United States for the Western District of Washington, Northern Division, be reversed, and

that proper decree be rendered herein dismissing said action as to this appellant.

W. H. BOGLE,

THOMAS B. HARDIN,
CHAS. P. SPOONER,

Solicitors for Appellant, 377 Colman Building, Seattle, Wash.

[Endorsed]: Assignment of Errors. Filed in the U. S. Circuit Court, Western District of Washington. June 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

Citation (Copy).

UNITED STATES OF AMERICA.

To Grenville M. Dodge, Complainant, and Frank Waterhouse, Defendant, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco within thirty days from this date, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Grenville M. Dodge is complainant and appellee, and Frank Waterhouse is defendant and appellee, and Frank Waterhouse & Co., Inc., is appellant, to show cause, if any there be, why the final decree in

said cause should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable WILLIAM B. GILBERT, Circuit Judge of the United States, this 6th day of June, in the year of our Lord one thousand nine hundred and seven.

[Seal] C. H. HANFORD,
Judge.

Due and personal service of the within citation, by certified copy admitted this 6th day of June, 1907.

GEO. H. KING,
Solicitor for Complainant.

[Endorsed]: Citation. Filed in the U. S. Circuit Court, Western Dist. of Washington. June 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1290.

GRENVILLE M. DODGE,
Complainant,

vs.

FRANK WATERHOUSE & CO., Inc., and FRANK WATERHOUSE,
Respondents.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and properly certify a transcript of the record in this cause and insert therein the following, for use on appeal:

Bill of complaint, filed April 26, 1905.

Answer, filed May 3, 1905.

Exceptions to answer, filed May 26, 1905.

Order overruling exceptions to answer, filed May 29, 1905.

Memo. decision, filed July 6, 1905.

Order overruling exceptions to answer, filed July 12, 1905.

Replication, filed August 2, 1905.

Deposition of Frank S. Pusey, published June 21, 1906.

Testimony, filed June 16, 1906.

Complainants' Exhibits 8 to 17, 19, 20, 21, 22, 23, 24, 25 and 26, and Respondents' 95 exhibits, filed June 16, 1906.

Deposition of Grenville M. Dodge and Frank S. Pusey, published June 16, 1906.

Memo. decision on merits, filed May 14, 1907.

Final decree, filed May 20, 1907.

Supersedeas and appeal bond, filed June 6, 1907.

Petition for appeal, filed June 6, 1907.

Order allowing appeal, filed June 6, 1907.

Assignment of errors, filed June 6, 1907.

Citation, filed June 6, 1907.

Dated June 17, 1907.

BOGLE, HARDIN & SPOONER,
Attorneys for Respondents.

[Endorsed]: Praecipe. Filed in the U. S. Circuit Court, Western Dist. of Washington. June 17, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1290.

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE,
Complainant and Appellee.
FRANK WATERHOUSE,
Defendant.

Clerk's Certificate to Transcript.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Wash-

ington, do hereby certify the foregoing four hundred and forty (440) typewritten pages, numbered from one to 440 inclusive, to be full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as the same remain of record and on file in the office of the clerk of said court, as, by the praecipe of the solicitor for the appellant I am required to certify and transmit as the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, from the order and decree of the Circuit Court of the United States for the Western District of Washington, in said appeal mentioned.

I further certify that the cost of preparing the foregoing record on appeal is the sum of $340.60, and that said sum has been paid to me by Bogle, Hardin & Spooner, solicitors for appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 26th day of July, 1907.

[Seal] A. REEVES AYRES,
Clerk.
By R. M. Hopkins,
Deputy Clerk.

Citation (Original).

UNITED STATES OF AMERICA:

To Grenville M. Dodge, Complainant, and Frank Waterhouse, Defendant, Greeting :

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco within thirty days from this date, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Grenville M. Dodge is complainant and appellee, and Frank Waterhouse is defendant and appellee, and Frank Waterhouse & Co., Inc., is appellant, to show cause, if any there be, why the final decree in said cause should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable WILLIAM B. GILBERT, Circuit Judge of the United States, this 6th day of June, in the year of our Lord one thousand nine hundred and seven.

[Seal] C. H. HANFORD,
Judge.

Due and personal service of the within citation, by certified copy, admitted this 6th day of June, 1907.

GEO. H. KING,
Solicitor for Complainant.

[Endorsed]: No. 1290. Circuit Court of the United States for Western District of Washington, Northern Division. In Equity. Grenville M. Doge, Complainant, vs. Frank Waterhouse & Co., Inc., et al., Respondents. Citation. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jun. 6, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Bogle, Hardin & Spooner, Attorneys for Respondents.

[Endorsed]: No. 1490. United States Circuit Court of Appeals for the Ninth Circuit. Frank Waterhouse & Co., Inc., Appellants, vs. Grenville M. Dodge and Frank Waterhouse, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Filed August 12, 1907.

F. D. MONCKTON,
Clerk.

No. 1490

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE and FRANK WATERHOUSE,
Appellees.

In Equity

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Brief for Appellant

W. H. BOGLE,
CHARLES P. SPOONER,
Solicitors for Appellant.

377 Colman Block
SEATTLE, WASHINGTON.

The Ivy Press, Second and Cherry, Seattle

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE and FRANK WATERHOUSE,
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In Equity

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Brief for Appellant

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FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE and FRANK WATERHOUSE,
Appellees.

In Equity

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Brief for Appellant

STATEMENT.

In January, 1904, the appellant was the owner of the steamship "Garonne." One W. H. Ferguson, acting for an undisclosed principal, who, as it subsequently transpired, was the North Alaska Steamship Company, entered into an option contract to purchase this vessel from the appellant, the terms of which contract are expressed in the telegram from the appellant to said Ferguson under date of February 3, 1904, in words as follows:

"Seattle, February 3, 1904.

"W. H. Ferguson, Fifth Avenue Hotel, New York, N. Y.

"Your thousand received and accepted and I now confirm sale of 'Garonne,' provided you pay me fourteen thousand dollars February fifteenth, deferred payments to be made as follows: Ten thousand dollars March fifteenth, ten thousand June fifteenth, five thousand September fifteenth, five thousand November fifteenth, all this year; five thousand February fifteenth, five thousand April fifteenth, five thousand June fifteenth, five thousand August fifteenth, five thousand October fifteenth, ten thousand December fifteenth, all nineteen five; five thousand March fifteenth, nineteen six, deferred payments to be securd by first mortgage on steamer, assignment marine insurance, corporation bond guaranteeing vessel against indebtedness and other security which shall be satisfactory to me. Sale conditioned on terms and representations my letter to you January twenty-sixth. Confirm this understanding.

F. W. FRANK WATERHOUSE."

(p. 361 Transcript.)

The letter referred to in this telegram is found on page 362 of Transcript. The purchase price was $85,000, $1,000 being paid in cash and $14,000 to be paid on February 15, 1904. The deferred payments were to extend over a period of two years, and to be secured (1) by a mortgage on the vessel, (2) an assignment of the marine insurance, (3) a corporation bond to protect the seller and his security from any indebtedness that might be contracted by the purchaser on the credit of the vessel, and (4) by other securities to be satisfactory to the seller. It was contemplated that the purchaser would accept title to the vessel on February 15th, when the $14,000 was paid, and would at that time furnish the securities called for by the contract. On February 5th Ferguson wrote to

appellant confirming the terms of the sale, but stating that they would take title and finish up the details on the payment of the $10,000 due March 15th, instead of at the time of the payment on February 15th.

(See Transcript, p. 429.)

On February 10th the appellant wired Ferguson as follows:

"February 10, 1904.

"W. H. Ferguson, Fifth Avenue Hotel, New York, N. Y.

"Received your letter fifth. A vital condition of sale Garonne to you was that purchase should be entirely completed by February fifteenth by exchange of steamer for fifteen thousand cash, notes, mortgage bond and other satisfactory collateral. Am willing accept fourteen thousand next Monday, provided you agree execute notes, mortgage bond and deliver securities by March first, or forfeit the fifteen thousand if you fail; but I want you to advise by wire what character of collateral to deferred payments you will furnish in addition to mortgage and bond, so I may pass upon same by Monday. I guarantee Garonne good insurable risk, and will pass United States inspection for commission, by expenditure on your part of about seventy-five hundred dollars. Am now doing considerable work on her my own expense, preparatory to inspection. Other parties anxious to purchase her next Monday at same price for practically cash.

Rush. Frank Waterhouse."

(p. 425 Transcript.)

On February 11th Ferguson wired appellant in answer as follows:

"New York, February 11: 04.

"Frank Waterhouse, Burke Bldg., Seattle, Wash.

"Understand Garonne transfer on payment twenty-five thousand my principal understands same and has gone south cannot reach Seattle until March tenth or

twelfth. We propose pay fourteen thousand Feby. fifteenth, ten thousand March fifteenth, make then Notes for balance mortgage insurance policy good security bonds or cash I may not reach Seattle until March fifth Will pay shipkeeper until transfer.

W. H. Ferguson."

(p. 428 Transcript.)

This settled the terms of the contract definitely, and on February 15th C. B. Smith, President of the North Alaska Steamship Company, for whom Ferguson had been acting, paid to appellant the $14,000 due on that date and appellant gave him a receipt therefor in words as follows:

"Received, Seattle, February 15, 1904, of C. B. Smith, Fourteen Thousand Dollars, being payment due this day on contract for purchase of Steamship "Garonne." Another payment of $10,000.00 and the execution of notes, mortgage, bond and collaterals for deferred payments are to be made and completed on or before March 15, 1904, as per terms of contract; and if default is made by said Smith in making said further payment or in execution of said securities on or before March 15th next, then his right to purchase said vessel shall cease, and all moneys paid by him toward such purchase shall be forfeited to and be and remain the moneys of this Company.

Frank Waterhouse & Co., Inc.,
By Frank Waterhouse,
President."

(p. 426 Transcript.)

On March 15th the purchaser remitted to the appellant from New York $7,000.00, and on March 18th a further sum of $3,000.00, making the $10,000 due March 15th, but was not able to take title and furnish the bond and securities called for by the contract. It will be observed

that under the contract the appellant held the title to the vessel and the sale was upon the express condition that the payments should be made as they matured, and that these securities should be furnished on or before the 15th of March, 1904. The purchaser continually promised to furnish these securities and take the title to the vessel, but failed to do so. The appellant, without waiving any of its rights under the contract, did not enforce the forfeiture at that time, but was constantly insisting that the purchaser should take title and furnish the securities as agreed upon. (See Transcript, pp. 208, 444, 422, 411, 406, 405, 401, 446, 441.) In April, 1904, the appellant prepared and signed a bill of sale of the vessel to the North Alaska Steamship Company, and deposited it with the Chase National Bank of New York, to be delivered to the purchaser upon the furnishing of the securities called for by the contract. (Transcript, pp. 415, 257-8.) The purchaser at various times stated that they would be able to furnish the securities in a short time, and in one of their communications stated that they had made an arrangement with Gen. G. M. Dodge, the appellee in this case, that would fully protect the appellant. No statement was ever made, however, as to what the nature of that arrangement was. (See Transcript, pp. 404-5, 212.) In the meantime, after making the payment of March 15th, the appellant permitted the purchaser to take a qualified possession of the vessel for the purpose of mak-

ing certain repairs and betterments, which the purchaser desired to make, and preparing for the Nome season. This was upon the distinct agreement, however, that no indebtedness should be incurred against the vessel, and that all repairs, betterments and supplies should be paid for in cash by the purchaser, and the vessel kept free of incumbrances. (See Record, p. 209.) It soon began to develop, however, that Ferguson and Hastings, the representatives of the purchaser, were incurring debts for material, labor and supplies on the credit of the vessel, and the appellant was constantly urging the purchasing company to discharge these debts and consummate its agreement of purchase. In fact, from about the first of April until the first of June the appellant was urging and insisting that the debts thus incurred against the vessel should be promptly paid off, and the contract consummated. The record shows that the appellant not only insisted upon this, but time and time again threatened to cancel the contract and forfeit the payments theretofore made by the purchasing company, unless these debts were paid and the securities called for by the contract furnished. (See Transcript, pp. 444-5-6.) The purchasing company did make various and sundry payments, both upon the purchase price and in discharge of debts incurred by it for labor, material and supplies for the vessel, and as the Nome season approached, that company constantly assuring the appellant that it would carry out its contract

in full before the vessel sailed, made all arrangements for operating the steamer during the Nome season, and engaged a full cargo of freight and passengers for the voyage to commence about the first of June. Finally during the latter part of May, the appellant, having exhausted its patience, notified the North Alaska Steamship Company that unless these debts incurred against the ship were promptly paid off and the terms of the contract of purchase complied with by the furnishing of the securities called for by the contract, it would not permit the vessel to sail in charge of the North Alaska Steamship Company, and would cancel the contract of purchase. (See Record, pp. 448-, 401.) On or about the first of June, 1904, C. B. Smith, the president of the North Alaska Steamship Company, appeared in Seattle, and at the same time one Frank S. Pusey appeared here representing the appellee Dodge. Pusey claimed that the North Alaska Steamship Company was indebted to Dodge in the sum of $10,000 borrowed money, and he was desirous of securing that indebtedness. Smith was a friend of Dodge and apparently willing to secure him as far as was possible. At that time the balance due the appellant for purchase money was something over $55,000. There were outstanding bills incurred by the North Alaska Steamship Company for labor, material and supplies for the vessel, and which were liens on the vessel, but the exact amount thereof was not known. These debts had been incurred

by Ferguson and Hastings, and the appellant had no means of ascertaining the amount so outstanding. They had made inquiries, however, and quite a number of the bills had been sent to the appellant with demand of payment, it being known that the appellant was the owner of the vessel. So far as the appellant could ascertain at that time, these outstanding bills amounted to between $13,000 and $15,000. The situation then was as follows:

Appellant held the title to the vessel and there was a balance due them of something over $55,000 on the purchase price. The purchaser had failed to comply with the terms of the contract which called for a bond guaranteeing that no debts would be incurred against the vessel, and for security for balance of deferred payments. These were vital conditions in the contract of sale, and had never been waived in any way whatever. The appellant, however, was not disposed to be unduly exacting, and was willing to give the purchaser fair and reasonable opportunity to carry out his contract, provided appellant was amply secured in the balance due it for purchase money. The vessel at that time, as stated above, was ready to sail for Nome, and had a full cargo of freight and a full passenger list, and part of the moneys received from freight and passengers had been paid over to the appellant and had been applied partly to the outstanding supply debts against the ship, and partly on the balance of purchase price, reducing the amount due on purchase

price to a little over $37,000. After two days' negotiations, appellant finally agreed with Smith, the president of the North Alaska Steamship Company, that if his company would pay all of the outstanding labor, material and supplies, then estimated to be between $13,000 and $15,000, and would take title to the vessel and give appellant a first mortgage thereon for the balance of thirty-seven thousand and odd dollars, payable in twenty and forty days from that date, they would consent to the vessel sailing in charge of the North Alaska Steamship Company on the voyage. Smith agreed to these terms and stated that he would wire to the company in New York the amount of the outstanding indebtedness, and that the company would telegraph the money within forty-eight hours to pay the same in full. At the same time Smith entered into an agreement with Pusey, representing Dodge, agreeing that the company would give him a second mortgage on the vessel for the $10,000 claimed by him, payable in sixty days from that date, and would also assign to him $5,000 of the freight money on the cargo payable at Nome upon the arrival of the ship and delivery of the cargo. As a matter of convenience it was agreed that one mortgage should be taken securing both the appellant and Dodge, the mortgage expressing on its face that the appellant's claim should be prior and paramount. It was further agreed between appellant and Dodge as a matter of convenience and for the accommodation of Dodge, that appellant would act as trustee for Dodge in

by Ferguson and Hastings, and the appellant had no means of ascertaining the amount so outstanding. They had made inquiries, however, and quite a number of the bills had been sent to the appellant with demand of payment, it being known that the appellant was the owner of the vessel. So far as the appellant could ascertain at that time, these outstanding bills amounted to between $13,000 and $15,000. The situation then was as follows:

Appellant held the title to the vessel and there was a balance due them of something over $55,000 on the purchase price. The purchaser had failed to comply with the terms of the contract which called for a bond guaranteeing that no debts would be incurred against the vessel, and for security for balance of deferred payments. These were vital conditions in the contract of sale, and had never been waived in any way whatever. The appellant, however, was not disposed to be unduly exacting, and was willing to give the purchaser fair and reasonable opportunity to carry out his contract, provided appellant was amply secured in the balance due it for purchase money. The vessel at that time, as stated above, was ready to sail for Nome, and had a full cargo of freight and a full passenger list, and part of the moneys received from freight and passengers had been paid over to the appellant and had been applied partly to the outstanding supply debts against the ship, and partly on the balance of purchase price, reducing the amount due on purchase

price to a little over $37,000. After two days' negotiations, appellant finally agreed with Smith, the president of the North Alaska Steamship Company, that if his company would pay all of the outstanding labor, material and supplies, then estimated to be between $13,000 and $15,000, and would take title to the vessel and give appellant a first mortgage thereon for the balance of thirty-seven thousand and odd dollars, payable in twenty and forty days from that date, they would consent to the vessel sailing in charge of the North Alaska Steamship Company on the voyage. Smith agreed to these terms and stated that he would wire to the company in New York the amount of the outstanding indebtedness, and that the company would telegraph the money within forty-eight hours to pay the same in full. At the same time Smith entered into an agreement with Pusey, representing Dodge, agreeing that the company would give him a second mortgage on the vessel for the $10,000 claimed by him, payable in sixty days from that date, and would also assign to him $5,000 of the freight money on the cargo payable at Nome upon the arrival of the ship and delivery of the cargo. As a matter of convenience it was agreed that one mortgage should be taken securing both the appellant and Dodge, the mortgage expressing on its face that the appellant's claim should be prior and paramount. It was further agreed between appellant and Dodge as a matter of convenience and for the accommodation of Dodge, that appellant would act as trustee for Dodge in

taking said mortgage. This trust agreement is set out at large in the record on page 537 of the Transcript. Pursuant to these arrangements, notes were drawn payable to appellant, in twenty and forty days for the amount due it, and a separate note payable to the appellant as trustee for the $10,000 owing to Dodge, and these notes were signed by Smith as president of the North Alaska Steamship Company. A bill of sale of the vessel by the appellant to the North Alaska Steamship Company was also drawn and signed by appellant and a mortgage was drawn to be executed by the North Alaska Steamship Company, securing the debt due appellant and also the debt due Dodge, and expressing the priority of appellant's debt. The home office of the North Alaska Steamship Company was in New York, and its board of directors and secretary were also there. The mortgage was signed by Smith, as president of the North Alaska Steamship Company, and the bill of sale and mortgage were then forwarded by the appellant to the Chase National Bank, with instructions to deliver the bill of sale to the North Alaska Steamship Company upon its completion of the execution of the mortgage by proper resolution of its board of directors, and the signature by the secretary under the seal of the company. These various documents are found on page 538 of the Transcript. The letter to the Chase National Bank enclosing the documents is found on page 383 of the Transcript. At the same time appellant wrote the Occi-

dental Securities Company of New York (which company was the holder of all of the stock of the North Alaska Steamship Company, and its financial agent) setting forth the terms of the agreement with Smith and requesting that company to promptly remit the money to pay off these outstanding bills and complete the execution of the mortgage. (Transcript, p. 386.) This was the status of things when the "Garonne" sailed with Smith on board for Nome. Pusey had appointed Smith agent to collect the $5,000 freight money assigned by Smith as president to Dodge as additional security for his debt. (Transcript, p. 549.) No money was remitted from New York to pay these outstanding debts. When the documents above referred to were received there, the officers and board of directors of the company refused to execute the mortgage or to make further payments on the debts of the company, and stated that they wanted to make some further investigation before assenting to the agreement made by Smith. (See Record, pp. 369-371.) Some time about the middle of June, 1904, one S. C. Mead was sent to Seattle to investigate the condition of the North Alaska Steamship Company's affairs on behalf of that company and its stockholders. (See Record, p. 371-2.) By that time the appellant had discovered that the outstanding bills for labor, material and supplies incurred by the North Alaska Steamship Company upon the credit of the vessel amounted to something over $30,000, instead of from

$13,000 to $15,000 as had been supposed at the time Smith and Pusey were in Seattle. Mr. Mead, after making his investigation and ascertaining these facts, stated that the indebtedness was much larger than had been anticipated by the company, and that the company had been misled by the representations of Ferguson as to the amount of these bills, and requested Mr. Waterhouse, the president of the appellant company, to return to New York with him and have a full conference with the company and those interested in it as to what was best to be done for the interest of all parties. Mead assured him, however, that the company would make some satisfactory arrangement with him to take care of these debts and to carry out its contract. Accordingly Mr. Waterhouse and his attorney returned to New York with Mr. Mead, arriving there about the first of July. A meeting of all parties interested in the North Alaska Steamship Company and in the Occidental Securities Company was immediately called by Mr. Mead. At that meeting Mead made his report of the condition of affairs as disclosed by his investigation; showing that the company was indebted in the sum of about $30,000 for outstanding current bills for labor, material and supplies, bought at Seattle by Ferguson, the company's representative, and which were in the main past due and constituted lien upon the ship. The balance due Waterhouse on the purchase price, after crediting some $18,000 of freight and passenger receipts, was

$37,671.46. Waterhouse called upon the company and those interested in it to make some arrangement to pay off this current indebtedness, and either carry out the original contract of purchase, or consummate the agreement made by Smith. In either event the first consideration was to pay the outstanding current bills which were liens on the ship. The discussion among the parties interested in the North Alaska Steamship Company disclosed a lack of harmony among the stockholders, some of them, including a Mr. King of New York, claiming that their subscriptions for stock of the company had been procured by false representations made by the officers of the company as to the condition of its affairs. The negotiations between Waterhouse and these people continued until the 8th or 9th of July. Waterhouse, in his eagerness to secure a settlement of his debt, offered if they would pay the current outstanding bills, to extend the payments of the balance due him for six, twelve and eighteen months, provided all obligations that were liens against the ship should be taken up, so that his should be the first lien and the company should protect him against the incurring of any other indebtedness that would be a maritime lien superior to his lien. Finally on the 8th of July the stockholders of the company reported that they were absolutely unwilling to put up more money for the company, and the officers of the company thereupon announced their utter inability to pay off the current lien

debts against the ship, or to make any further payments. The company was admitted to be without assets of any kind. Waterhouse thereupon gave the company written notice that unless these current lien debts were at once paid off, and the company carried out the terms of his contract by furnishing the securities agreed upon, he would declare the contract forfeited, draw down the documents that had been deposited in the Chase National Bank (the bill of sale and uncompleted mortgage) and resume possession of the ship. On the next day the company, by resolution of its board of directors, abandoned the contract of purchase, and directed its attorneys to take steps to recover the purchase money that had been previously paid to Waterhouse, and the attorneys thereupon served a written notice upon Waterhouse to that effect. (See pp. 432-6 of Transcript.) Waterhouse then found himself with the ship thrown back on his hands incumbered by something over $30,000 of current bills which were liens on the ship and past due, and the most profitable part of the Nome season past, and threatened with litigation by the North Alaska Company on their claim for the moneys that they had previously paid to Waterhouse on the contract of purchase. A conference was then had between the attorney for the North Alaska Company and the attorney for Waterhouse & Company, which resulted in an agreement that the North Alaska Company would waive any claim for a return of the purchase money previously paid to Waterhouse & Company, and Waterhouse

& Company would waive any claim against the North Alaska Company for the balance of the purchase price, amounting then to some $37,671.46; and Waterhouse also waived any claim to the freight money on previous voyage payable at Nome, which had been assigned by the North Alaska Company to Dodge, and turned over to Smith for collection for the account of Dodge. Receipts were thereupon passed between the North Alaska Company and Waterhouse waiving and releasing any claim, each against the other. After this adjustment Waterhouse found himself embarrassed by these debts which were liens against the ship, being for labor, material and supplies, and approached Mr. W. F. King, who was one of the stockholders of the other company, and complained to King that he had been misled and badly treated and found himself in an exceedingly embarrassing position financially because of this heavy indebtedness thrown back upon him, and asked King if he would not assist him in some way in relieving himself of this embarrassment. King recognized the fact that Waterhouse had been badly treated, and expressed a disposition to assist him, if Waterhouse could suggest a practicable way in which it could be done. Waterhouse thereupon proposed to King that if he, King, would put up $30,000 with which to pay off these current liens on the ship, he, Waterhouse, would put in the balance of the purchase money due him, say $37,000, and the two of them would own the ship in that

proportion, that is to say, that the ship would be conveyed to a company capitalized at $67,000, of which Waterhouse would pay $37,000 and King $30,000 in stock. After some consideration, King accepted this proposition, except that he wished a modification of it, so as to give him an equal voice in the management of the company that was to take hold of the vessel, and suggested that the company be organized with a nominal capital stock, which stock should be held by King and Waterhouse in equal parts, and that that company should execute its notes to Waterhouse for $37,000 and King for $30,000. This modification was accepted by Waterhouse and the agreement thereupon between him and King reduced to writing. (See Transcript, pp. 282 and 334.)

Waterhouse thereupon returned to Seattle, and King shortly thereafter incorporated the Merchants & Miners Steamship Association of New York, pursuant to the terms of the agreement with Waterhouse. The vessel was subsequently conveyed to that company, and it executed its notes to Waterhouse for $37,000 and to King for $30,000, but no capital stock was ever in fact issued or subscribed for. This was in July, 1904. Subsequently, in April, 1905, the Merchants & Miners Steamship Company sold the vessel to the White Star Steamship Company for $90,000, par value, of the stock of that company.

After Pusey left Seattle, he went South and did not reach New York until after the negotiations above re-

ferred to. When Waterhouse reached New York with Mead, he requested the parties there to bring in all parties in New York who were in any wise interested in the North Alaska Steamship Company, whether as officers, stockholders or creditors, and explained to all of the parties the nature of the agreement which Smith had undertaken to make for the company, but which the company had failed to carry out, with respect to the Dodge debt, and asked that General Dodge be communicated with and brought in. Mr. Corwine, who was one of the stockholders of the New York Company, agreed to make inquiries as to the whereabouts of General Dodge, and reported to Mr. Waterhouse that General Dodge was out of the city and could not be reached. General Dodge was not present at any of the meetings in New York and no further attempt was made by Waterhouse to get into communication with him during these conferences. (See pp. 275-6 and 231 of Transcript.) Dodge was informed by some of the officers of the North Alaska Steamship Company of the transactions that had taken place some time during the latter part of July, 1904, and was also informed by Waterhouse by letter soon thereafter in answer to a letter received from Pusey. (See Transcript, pp. 495-6.) No further action was taken by Dodge until the 26th day of April, 1905, when the bill of complaint in this case was filed.

When Smith assigned the freight money, amounting to $5,000, to Dodge in June, 1904, Pusey appointed Smith

Dodge's agent to collect this money at Nome, and to remit the same to the Seattle National Bank to the credit of Waterhouse & Company as trustee. Smith never collected the money, or if he did, he misappropriated it, and none of it was ever remitted to either the Seattle National Bank or to Waterhouse & Company. The testimony shows that Smith used the money at Nome for the benefit of some other companies in which he was interested. (Transcript, pp. ———.) The court below held that the transactions had between Waterhouse, Pusey and Smith on July 2nd constituted Waterhouse an active trustee for the collection of the Dodge debt; that the mortgage then signed by Smith as president of the North Alaska Steamship Company constituted a lien upon the vessel for the securing of Dodge's debt, notwithstanding the fact that the mortgage was never executed by the secretary and that the board of directors refused to authorize its execution; that the conveyance of the vessel by Waterhouse & Company to the Merchants & Miners Steamship Company was in violation of the duty owing by Waterhouse & Company to Dodge under the alleged trust agreement had rendered Waterhouse & Company personally liable for the full amount of Dodge's debt against the North Alaska Steamship Company, together with interest and attorney's fees, as provided in the note executed by Smith for that company, and a decree was entered accordingly. The case was dismissed as to Frank Waterhouse individually.

Waterhouse & Company appealed from that decree and assigned error as follows:

I.

The suit was brought to charge this appellant as trustee with an indebtedness alleged to be owing by the North Alaska Steamship Company to the appellee, Grenville M. Dodge. The debtor, North Alaska Steamship Company, is an indispensable party to the proceedings, and the court below erred in entertaining jurisdiction of the cause in the absence of the North Alaska Steamship Company from the record.

II.

The court below erred in rendering judgment against this appellant in favor of appellee, Grenville M. Dodge, and in refusing to enter decree dismissing said cause.

ARGUMENT.

I.

The North Alaska Steamship Company, which is the debtor of Dodge, was an indispensable party. Inasmuch as that company was a corporation organized under the laws of the State of New York, of which state Dodge was also a citizen, it could not be made a party to this suit without defeating the jurisdiction of the court. Nevertheless, if it was an indispensable party, the court was with-

out jurisdiction to proceed to adjudicate as between the parties of record.

The theory of the bill of complaint is that the North Alaska Steamship Company is indebted to Dodge in the sum of $10,000, with interest; that sufficient securities to secure this indebtedness were held by appellant Waterhouse & Company, and that by its dealings with these securities Waterhouse & Company have become liable to Dodge for this debt. Manifestly there could be no liability upon the part of the appellant to Dodge unless in fact there is shown to exist an indebtedness from the North Alaska Steamship Company to Dodge. We insist that the court had no jurisdiction to adjudicate that such an indebtedness was in existence in the absence of the debtor from the record.

Saloy vs. Bloch, 136 U. S. 338;
Gregory vs. Stetson, 133 U. S. 579;
California vs. S. P. R. Co., 157 U. S. 229;
Consolidated R. Co. vs. City, 93 Fed. 849.

The court below apparently recognized the soundness of this position, but held that the exchange of receipts and releases between Waterhouse & Company and the North Alaska Steamship Company in New York in July, 1904, in some manner operated to discharge the North Alaska Steamship Company from its indebtedness to Dodge, and operated as an assumption of that indebtedness by Waterhouse & Company. We think this is a

palpable misconstruction or misconception of what was done between those parties. The fact was that the North Alaska Steamship Company had contracted to buy this vessel from Waterhouse & Company on certain terms and had made various payments thereon, and afterwards had defaulted upon its contract. It abandoned its contract of purchase, thus throwing the vessel back on Waterhouse's hands encumbered with some $30,000 of maritime liens incurred by the North Alaska Steamship Company for labor, material and supplies for the vessel. In order to avoid threatened litigation between the parties, Waterhouse & Company released the North Alaska Steamship Company from any liability for the unpaid purchase money on that vessel, and the North Alaska Steamship Company released Waterhouse from any liability to return any part of the purchase money previously paid. To effectuate this arrangement full releases were exchanged between these parties. Neither party was dealing with the Dodge debt in that transaction, nor did Waterhouse & Company intend to, nor did they in fact release the North Alaska Steamship Company from any indebtedness it owed to Dodge, whether such indebtedness was evidenced by notes running to Dodge, or by notes running to Waterhouse as trustee for Dodge. The release given by Waterhouse & Company to the North Alaska Steamship Company was given in their own right, and did not operate to release any debt that might be due them as trustees for any other person. We do not think that it

has ever before been held that a release executed by a person in his individual capacity and intended to relate to personal and individual dealings, operated to release any debt that might be due to such person as executor, administrator, guardian or other trustee for a third person. Such construction is contrary to the plain intent of the parties and does violence to the language used by the parties in the documents executed by them.

Evans vs. Wells, 22 Wend. (N. Y.) 324.

Trow vs. Shannon, 78 N. Y. 446.

We respectfully submit that the North Alaska Steamship Company was an indispensable party to this proceeding, and that there could be no adjudication of the relation of debtor and creditor between Dodge and that company in the absence of that company from the record, and as the establishment of the debt owing by the North Alaska Company to Dodge was an essential prerequisite to the adjudication of any liability of Waterhouse & Company to Dodge for that indebtedness, the case should have been dismissed for want of jurisdiction.

II.

The trust agreement relied upon by appellee as the basis of liability of Waterhouse & Company is in the following words:

"Memorandum between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co., Inc., of Seattle, Washington.

The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about $37,-671.46 being balance due on purchase price of the Steamship 'Garonne,' and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money.

It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Co. upon the steamship 'Garonne' to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steamship Co., payable to them as trustee, for the amount so owing to said Dodge, said note to be payable in two months from date:

It is agreed that said Waterhouse & Co., Inc., in acting as such trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

FRANK S. PUSEY, Agent,
For G. M. DODGE.
FRANK WATERHOUSE & CO., INC.,
By FRANK WATERHOUSE,
President."

It will be observed that the only duty assumed by Waterhouse in that agreement was to "take a mortgage" from the North Alaska Steamship Company upon the steamship "Garonne" to secure both claims, and to take a note from the North Alaska Steamship Company payable to them as trustee for the amount owing to Dodge. The agreement further specifies that Waterhouse & Company "assumed no liability whatever with reference thereto except that it agrees to act in good faith."

In order to clearly understand what was intended by the parties by the arrangement entered into on June 2nd, it is necessary to consider what was their status and their respective rights at that time. Waterhouse in his original option contract of sale had endeavored to protect himself against the possibility of the mortgage security for the deferred payments being rendered worthless by maritime liens created against the ship by the purchaser. To accomplish this he had specified in his contract that he must have a mortgage and the marine insurance on the vessel, and in addition thereto a guaranty bond conditioned that the vessel would be kept free of liens, and other collateral security for his notes satisfactory to him. These terms were all clearly expressed in the original contract. He had never at any time waived any of them. The purchasing company, although it had made the deferred payments, had not been able to furnish this bond and collateral security, and at its solicitation Waterhouse & Company had extended the time for the consummation of the contract of purchase for their accommodation. The purchaser had at various times suggested that it would be able to make full payment for the vessel to Waterhouse before the first of June, which would prevent, of course, the necessity of furnishing collateral security and the necessity for a bond would be obviated. The purchasing company, through its representatives, Ferguson and Hastings, had incurred indebtedness

against the ship. The telegraphic correspondence in the record shows that Waterhouse & Company were constantly demanding of the purchasing company either the payment of this indebtedness for outstanding liens and the furnishing of the security required by the contract, or the alternative of full payment of the purchase price, and was constantly receiving promises from New York that these debts would be paid. On May 23rd when the time was approaching for the vessel to sail for Nome, Waterhouse telegraphed to the purchaser as follows:

"Received twenty-five hundred from you Saturday. Same day advanced two thousand for you. Steamer must coal next Wednesday, expense five thousand. Insurance must be placed this week, expense six thousand year's premium. Food supplies must be put aboard this week, expense six thousand. You now owe me money advanced five thousand. If balance purchase price paid immediately cash or satisfactory securities, you will be at liberty to contract all bills you desire 'Garonne's' credit, and pay same out of freight and passenger receipts available June second. If purchase not completed immediately must have cash before can permit coal supplies and insurance to be purchased steamer's credit. Please advise quickly what course you will pursue."

Defendant's Exhibit C-1, p. 391 Transcript.

He had previously wired them on May 20th that unless payments were made to protect him against the outstanding bills he would take the necessary steps at once to cancel the sale. (See Defendant's Exhibit B-1, Transcript, p. 391.) The purchaser answered the telegram of May 23rd as follows:

"Appreciate urgency making all efforts close arrangement pay you."

(Transcript, p. 399.)

No money having been received by Waterhouse & Company, notice was given to purchaser by his attorney that steps would be taken to cancel the contract at once. The purchaser under date of May 25th wired Waterhouse that money would be immediately furnished to pay for coal, supplies and insurance, and that Smith was leaving New York for Seattle to complete the contract. (See Defendant's Exhibit K-1, p. 398 Transcript.) Waterhouse replied under date of the 26th that these promises were unsatisfactory, and that the coal and supplies would not be permitted to go aboard the steamer until the money was received to pay for them. He also notified the purchaser that the securities for the deferred payments as called for by the contract must be executed and deposited with the Chase National Bank for his benefit, or the balance of the purchase price paid, before he would permit any further indebtedness to be incurred against the ship for either coal or supplies. (See Defendant's Exhibit O-1, p. 401 Transcript.) This was the status of things when Smith reached Seattle on May 31st. After his first interview with Waterhouse he wired his New York office as follows:

"W. will accept five thousand cash from New York at once and twenty-two thousand five hundred out of receipts, balance to be paid in thirty days, secured by mort-

gage and note. Remit five thousand immediately. Very imperative and must close at once."

Defendant's Exhibit "Y," Transcript, p. 389.

These communications clearly show the disposition of Waterhouse & Company at that time. They were demanding that the purchaser should either pay the balance of the purchase money or relieve the vessel of the supply liens and furnish the collateral security required by the contract under a penalty of having the contract forfeited if they failed to do so. In this condition of things Pusey arrived in Seattle and entered into the negotiations between Waterhouse and Smith. Up to that time Waterhouse had no relations whatever with Dodge. By a telegram and letter from the purchasing company in New York under date of May 17th, and received at Seattle on May 22nd, he was informed that some arrangement had been made by the purchasing company with Dodge which would in itself be a security for the indebtedness due Waterhouse. Assuming that this was some arrangement by which Dodge was to furnish the collateral security called for in the contract, Waterhouse wired the Chase National Bank of New York asking about Dodge's financial standing, and received a reply by wire to the effect that it was satisfactory. (Transcript, pp. ———.) This was the only information he had relative to Dodge's connection with the company. After he and Smith and Pusey had endeavored to ascertain the amount of the outstanding

bills against the "Garonne" for supplies, material and labor, and had ascertained, as they supposed, that it would not exceed $15,000, it was agreed between them that Smith should have his New York company forward the money to pay off these bills. Waterhouse was to apply such an amount from the receipts from passengers and freight, amounting to about $18,000, as would reduce the amount due him from $55,000 to about $37,000, and he agreed to accept twenty and forty day notes for that amount secured by first lien on the vessel. Pusey agreed to accept a second lien on the vessel for his $10,000, payable in sixty days. The testimony shows conclusively, first, that these arrangements by which Waterhouse became a trustee was without consideration and purely an accommodation; second, that it was a condition of this arrangement that the North Alaska Steamship Company should at once pay off the outstanding lien debts against the ship, so that the mortgage securing Waterhouse would be a first lien on the vessel, and third, that this mortgage must be authorized by the board of directors and executed by the secretary under the seal of the company, as well as by Smith as its president. Inasmuch as Smith, the president of the North Alaska Steamship Company, was sailing on the "Garonne" for Nome, the documents were signed by him in Seattle and then immediately forwarded to New York in order that the execution of them might be approved by the board of directors and com-

pleted by the secretary. The whole tenor of the correspondence between the parties, as well as the testimony of the witnesses, shows that Waterhouse never contemplated the waiving of the rights he then held under his original contract, and the acceptance of a mortgage, unless the company would first pay off these maritime liens, which would be a superior incumbrance, paramount to his mortgage. The testimony further shows conclusively that the signing of the mortgage by Smith, as president of the company, was not considered nor understood by the parties at the time as completing its execution or creating any lien upon the vessel. It was fully understood that the mortgage could not be executed by the North Alaska Steamship Company unless it was authorized by the board of directors, and the signature of the secretary under the seal of the company attached to the instrument. It was for this purpose that the mortgage was sent to New York.

The board of directors and the secretary of the company, however, refused to sanction this arrangement entered into by Smith at Seattle, and the board refused to authorize the execution of the mortgage, and the secretary refused to complete its execution, and the company refused or failed to make any provision for the payment of the outstanding maritime liens.

On June 10th Messrs. McKee & Frost, the attorneys of the North Alaska Steamship Company, wrote to Waterhouse stating that the board of directors would not

authorize the secretary and treasurer to sign the mortgage until they had before them all of the particulars of the transactions in Seattle and a full statement of the steamship accounts to and including the first sailing. (See Defendant's Exhibit "F," Transcript, p. 369.)

On June 10th Waterhouse had wired the secretary of the company as follows:

"Have you executed mortgage and remitted money pay expense bills here? These matters pressing; require immediate attention. Answer. Special Rush."

Defendant's Exhibit "U," Transcript, p. 383.

On June 11th he again wired the secretary that the underwriters were demanding immediate payment of the insurance premium. (See Transcript, p. 377.)

On June 13th he again wired the secretary as follows:

"If you remit thirteen thousand tomorrow for expenses execute mortgage in Chase National Bank immediately and pay me $8,600 June 22nd, I will extend balance of payments as follows: Ten thousand with interest on first note until July 12, entire amount of second note until August 15th. Answer."

In response to this he received a telegram from W. H. Rowe, the president of the purchasing company, as follows:

"Have consulted with those who have thus far financed our enterprise. They insist that no more money shall be paid until Mr. Mead has personal interview with you and goes over condition at Seattle. I trust you will await Mr. Mead's arrival he left today for Seattle."

See Defendant's Exhibit "G," Transcript, p. 370.

On the same day the Chase National Bank, holding the mortgage, wired the Washington National Bank in Seattle as follows:

"Respecting payments made to Waterhouse on boat we are requested by parties of responsibility and reputed wealth recently associated with Occidental Securities Co. to advise that pending payments will be made on satisfactory report by representative now en route. Notify Waterhouse."

Defendant's Exhibit "H," p. 371 Transcript.

On June 14th Mr. Rowe had also wired Waterhouse notifying him that Mr. Mead, the representative of the company, was leaving for Seattle, asking that matters stand in abeyance until his arrival. (Transcript, p. 372.) On June 14th Waterhouse had wired the company as follows:

"Will not let conditions remain as at present. Insist debts against 'Garonne' now due be paid immediately and mortgage be executed immediately. Will expect prompt reply stating definitely what you intend to do."

This correspondence proves beyond any question that Waterhouse & Company were making every exertion to secure the payment of the outstanding lien bills and the completion of the execution of the mortgage by the New York company, and that he was met with positive refusal by that company to make any payments or to complete the execution of the mortgage prior to the arrival in

Seattle of their representative, Mr. Mead, and his report upon the condition of the company. Under the tentative agreement with Smith and Pusey on June 2nd, one-half of the balance of the purchase money due Waterhouse, amounting to nearly $19,000, was to be payable on June 22nd. The telegrams above quoted show that Waterhouse was insisting upon the execution of the mortgage and the payment of the outstanding lien bills up to the date when Mead left New York, when he was definitely informed that no payments would be made until after Mead reported. Mead reached Seattle about June 20th, and did not complete his examination until several days later. He then reported that nothing could be done in the matter at that time, but persuaded Waterhouse to return to New York with him. When Waterhouse reached New York on or about July 1st, the arrangement made with Smith and Pusey had fallen through. The company had refused to execute the mortgage and had failed to pay off the lien debts. The first payment of one-half of Waterhouse's purchase money was then some ten days past due. The court below used the following language in his opinion in this case:

"I hold, however, that the mortgage which was signed by the president of the steamship company, the promissory note for $10,000 given to the defendant as trustee for the complainant, the assignment of freight money and the contract signed by the defendant and Pusey as agent for the complainant, constitute a contract binding upon all three of the parties. The documentary evi-

dence in the case proves that notice of the transaction was promptly sent to the secretary of the steamship company in New York, and that Smith's authority as president of the company was not disputed."

We most respectfully submit that this finding is directly contrary to all the evidence in the case. The secretary of the company not only failed to complete the execution of the mortgage, but reported to Waterhouse that no moneys would be advanced until after Mead's report. The attorneys for the company notified Waterhouse that the board of directors refused to authorize the execution of the mortgage by its secretary and treasurer until after they should have an opportunity to examine Mead's report. There is absolutely nothing in the record to show that Smith, as president, was authorized to execute a mortgage upon any vessel owned by the company, and the record affirmatively shows that he did not undertake to do so. On the contrary the mortgage as drawn shows on its face that it was to be executed by both the president and secretary as the officers of the company and under the seal of the company, and it was by agreement of all of the parties immediately sent to New York with the request that the board of directors would authorize its execution and that the secretary would complete the execution. We most respectfully submit, therefore, that the court erred in holding that this document, which was never executed, constituted any lien upon the vessel.

The trust agreement specifies that Waterhouse & Company are to "take a mortgage" from the North Alaska Steamship Company to secure both debts. We insist that Waterhouse did everything that he could do to induce the North Alaska Steamship Company to execute the mortgage, and that company refused to do so; that his entire obligation under this trust agreement with respect to taking of security for Dodge's debt, was discharged. He was named as trustee for Dodge merely to simplify a foreclosure if after the mortgage was executed a foreclosure was necessary. He did not undertake to become an active collecting agent for Dodge, and in our judgment no such obligation can be gathered from the terms of the trust agreement. If the finding of the court below to the effect that this mortgage became a subsisting security for Dodge's debt cannot be upheld under the evidence, then we think a reversal necessarily follows.

The court below held that Waterhouse should have notified Dodge of the negotiations in New York, and finds him guilty of inexcusable negligence in failing to do so. In this connection it must be remembered that Dodge was associated with the purchasing company. He was on terms of personal intimacy with Smith, its president, and testifies that his advance of money to the company was largely because of his personal relations with Smith. He was known to all of the stockholders and to the other creditors in New York. When the company refused to ex-

ecute the mortgage promptly, and allowed the time (June 22nd) when the first payment of one-half of his debt to pass, Waterhouse considered that the tentative agreement with Smith had fallen through. We think that he was amply justified in so believing. Even if Dodge had appeared in New York and had then been willing or had persuaded the company at that time to carry out the agreement that Smith had entered into, we think that Waterhouse could not technically have been compelled to carry it out. If he can be considered to have contemplated by the agreement with Smith a waiver of his right to cancel the original contract for a default of the purchaser, such contemplated waiver must be held to have been upon the express condition that the mortgage would be executed before June 22, when one-half of the purchase money would be paid, and the balance of it secured by first lien on the vessel payable twenty days thereafter. Now when he went to New York this condition had failed; the time had passed and the payment had not been made or the mortgage executed.

Waterhouse at that time, therefore, considered Dodge as standing upon the same basis as all other creditors. The company had refused to give him a second mortgage securing his $10,000. He took the same means of notifying Dodge of the critical condition of the company's interest in the property that he did with respect to other creditors and stockholders of the company. He stood on

one side of the counter and Dodge and the other creditors and stockholders stood on the other side. He was not seeking to conceal anything from Dodge. He trusted to the officers and stockholders of the company to notify all interested parties of what was going on. In the case of Dodge he made a special effort to have him notified. He requested Mr. Corwine, one of the stockholders of the company, to communicate with Dodge and secure his attendance at the conference and was informed by Mr. Corwine that Dodge was out of the city and not accessible. We take the position that Waterhouse owed no special duty to Dodge at that time, and that if he did, he took such reasonable steps to notify him as any other stranger in the city under the same circumstances would have taken. The court below assumes that the interests of the stockholders in the company, particularly of Corwine, were antagonistic to Dodge, and seems to infer that they made no effort to notify Dodge of these negotiations. The appellant is of course in no position to know whether these inferences of the court are correct or not. Waterhouse was in New York, a stranger dealing with strangers. He had no personal acquaintance with any of the parties interested in the North Alaska Steamship Company. He had no personal acquaintance with Dodge. His telegram to the Chase National Bank (See Record, p. 392) shows that he did not know who Dodge was and had no information as to his financial standing or "national reputation." Certainly there is nothing in the record that would justify

a holding that Waterhouse at that time owed any duty to Dodge which he disregarded, or that he was not acting in good faith in his attempt to notify him of the negotiations then pending, or of the failure of the company to execute the security which Smith had agreed to give.

The court below in substance holds that inasmuch as Waterhouse held the legal title to the vessel, and Smith, the president of the North Alaska Steamship Company, had verbally agreed that that company would give a mortgage to secure Dodge's debt, and Waterhouse had agreed to act as trustee in taking that mortgage, in equity he would be considered as holding the legal title to the vessel as security for the Dodge debt. We respectfully submit that such a holding amounts to the creation of a contract by the court which Waterhouse never agreed to make. In the first place, he held the legal title to the vessel with the right to cancel the contract of sale upon default on the part of the purchaser as security for his own debt. This security could not be converted into a security for Dodge's debt by any agreement between Waterhouse and Dodge. The North Alaska Steamship Company was Dodge's debtor, and its consent would have to be obtained before Waterhouse could in law or equity hold the legal title as security for the Dodge debt. This assent the North Alaska Steamship Company positively refused to give. In the second place Waterhouse agreed to waive his right to cancel the contract only on condition that the out-

standing maritime liens against the vessel were first paid by the company and a mortgage executed which would be a first lien securing the balance of his purchase money, and this was to be done prior to June 22nd, when his first payment was due. Now the court below has ignored these conditions, and has held Waterhouse to the waiver of his right to cancel the original contract, notwithstanding a refusal and failure of the North Alaska Steamship Company to comply with any of the conditions upon which he agreed to accept security on the vessel alone in lieu of his original contract. Instead of having a mortgage payable in twenty and forty days from June 2 upon the vessel, clear and free of all liens, the court, after a failure of the vendee to comply with the terms of the agreement, puts Waterhouse in the position of holding a security upon the vessel for his own purchase money and a second lien for the security of Dodge, and both of these debts subject to prior maritime liens amounting to over $30,000 past due and which Waterhouse was forced to take care of at his own expense. It seems to us that the simple statement of the facts shows that the court below was in error in this holding.

The court below also held that the contract entered into between Waterhouse and King after the North Alaska Steamship Company had abandoned its purchase, was a violation of the duties owing by Waterhouse to Dodge. As stated above, we think that Waterhouse's

duty to Dodge was fully performed when he endeavored to secure the execution of the mortgage securing Dodge's debt, and the debtor refused to execute it. To hold otherwise is to read something into the trust agreement in addition to what is there expressed. If, however, the court should hold that Waterhouse was still under some duty to endeavor to secure Dodge's debt, we think the record clearly shows that it was impossible to do so at that time without putting himself in very embarrassing financial position, and he was not required by any of the terms of the trust agreement to do so. The trust agreement expressly provides that there shall be no liability upon the part of Waterhouse to Dodge, provided he acts in good faith. When the North Alaska Steamship Company abandoned its contract of purchase, it was known to be utterly insolvent, in fact it had never had any assets, except the equity in the vessel, and this it had abandoned because of its inability to complete its purchase. Waterhouse was then confronted with something over $30,000 maritime liens against the vessel contracted by the North Alaska Steamship Company which that company was unable to pay and which were past due and many of them pressing for payment. In other words, he was in a position where the vessel would be liable and sold for these debts unless immediately provided with means of payment. He then turned to a Mr. King, one of the stockholders of the North Alaska Steamship Company, and offered to sell the vessel on a basis of $67,000, clear of

liens, if King would raise $30,000 of the $67,000, to be used in paying off these debts. This proposition, with a modification which gave King an equal voice in the management of the company to be organized to take title to the vessel, was accepted and carried out. This arrangement was not made nor any similar arrangement contemplated until after the North Alaska Steamship Company finally abandoned its contract of purchase. It was entered into by Waterhouse in perfect good faith and as the only means open to him to raise the money with which to pay the debts which were then pressing against the vessel. We feel confident that the court will find nothing in the record that will indicate in the remotest way that in entering into this arrangement Waterhouse was not acting in perfect good faith.

We contend finally that even if the court should hold that Waterhouse owed the duty to Dodge of notifying him of the failure of the North Alaska Steamship Company to execute the mortgage securing his debt, it cannot be held that the failure to give such notice rendered Waterhouse & Company liable for that debt. Dodge testified that he was informed of what had been done in New York on or about the 25th of July, 1904. If, as is now claimed, he asserted a lien on the vessel for his $10,000, good faith required that he should notify Waterhouse & Company of such claim promptly. He knew that Waterhouse was acting on the assumption that the failure of the company

to execute the mortgage ended any obligations Waterhouse had assumed to take security for Dodge's debt. Dodge did not assert any lien on the vessel, but apparently acquiesced in what had been done until in April, 1905, after the vessel had been sold by the company organized by King and Waterhouse, and it had passed out of Waterhouse's control. If Dodge had promptly asserted his claim to a lien and it had been established by the court, the vessel would have been sold for the purpose of paying, first, the maritime liens which had been paid off with the money received from King; second, the balance due Waterhouse on the purchase money, and, third, any amount due Dodge. Instead of proceeding promptly to assert his rights, he waited until the vessel had been disposed of and had passed into the hands of another company. We think the conditions were such as to require prompt action upon the part of Dodge in repudiating what had been done by Waterhouse and in asserting his lien upon the vessel. The court below found that the vessel was worth more than the outstanding liens and both Waterhouse and Dodge's debts. Some of the testimony would sustain that finding; other testimony showed a much less value. Prompt action on the part of Dodge would have avoided any uncertainty upon that question, because the vessel would have been in the hands of the Merchants & Miners Steamship Company and its sale would have settled definitely the question of its value.

We think that a careful perusal of the testimony in this case will convince the court that the decree appealed from is unjust, and that it should be reversed. The conduct of Waterhouse & Company throughout the entire transaction from the time they made the original option contract of sale to the time they conveyed the vessel to the Merchants & Miners Steamship Company has been characterized by perfect fairness toward all parties interested. They have endeavored to accommodate other interested parties just as far as they possibly could without impairing their own security or financial damage to themselves. It was for this that they extended the time for the North Alaska Steamship Company to execute the collateral securities for the deferred payments, first from February 15th to March 15th, and subsequently from March 15th down to the 5th of June. In the same spirit they agreed to waive their demand for collateral security for the deferred payments on the 2nd of June on condition that the North Alaska Steamship Company would pay off the lien debts contracted by them on the vessel, and would secure the balance of the purchase price by a mortgage which would in fact be a first lien on the vessel. It was in this same spirit that they consented to act as trustee for Dodge in taking the mortgage, and in the same spirit during the negotiations in New York they offered to extend the balance of the purchase money payments to six, twelve and eighteen months, provided that company

would promptly pay off all outstanding liens on the ship. We think the record discloses that this suit is an effort upon the part of Dodge to take unjust advantage of this spirit of accommodation shown by Waterhouse & Company.

Respectfully submitted,

W. H. BOGLE,

CHAS. P. SPOONER,

Solicitors for Appellant.

No. 1490

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., INC. *Appellant* vs. GRENVILLE M. DODGE, *Appellee* FRANK WATERHOUSE, *Defendant*	*No. 1490*

BRIEF OF APPELLEE

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc. *Appellant* vs. GRENVILLE M. DODGE, *Appellee* FRANK WATERHOUSE, *Defendant*	*No. 1490*

BRIEF OF APPELLEE

(NOTE—In the record the evidence is not printed in the order in which it was given. A clearer understanding of the case will be had by reading the testimony in the following order:

Deposition of G. M. Dodge, Record, pp. 462-478.

Deposition of Frank S. Pusey, Record, pp. 479-529.

Testimony on behalf of Complainant, Record, pp. 68-204.

Testimony on behalf of Respondent, Record, pp. 204-311.

Testimony of Complainant in rebuttal, Record, p. 312.

Interrogatories to Frank S. Pusey, in rebuttal, and answers thereto, Record, pp. 42-54.)

STATEMENT.

In February, 1904, the appellant, Frank Waterhouse & Co., Inc., being then the owner of the steamship "Garonne" contracted to sell her to the North Alaska Steamship Co., a New York corporation, for $85,000.00, payments to be made in installments covering a number of months (Defendant's Exhibit A, Record, p. 361).

On February 15th an installment of $14,000 on the purchase price of the steamship Garonne became due, and to pay the same the North Alaska S. S. Co. borrowed from appellee $12,000 and applied the same on account of the purchase price of the Garonne. In March an additional $1500 was borrowed from appellee by the North Alaska S. S. Co. and used in making another part payment of the purchase price (deposition of G. M. Dodge, Record, pp. 467, 470, and deposition of Pusey, Record, p. 480, et seq., testimony of W. H. Rowe, Record, pp. 104-110). In May, 1904, the North Alaska S. S. Co. entered into an agreement with the appellee, setting forth its indebtedness to appellee and agreeing to secure such indebtedness by a mortgage on the steamship Garonne. (See complainant's exhibit 1, Record, p. 531).

The mortgage mentioned in Complainant's Exhibit 1

not being executed, and the indebtedness to appellee not being paid, the "Garonne" being in Seattle about to sail to Nome, appellee sent his agent, Frank S. Pusey, on May 31, 1904, to Seattle, for the purpose of securing payment of the amount due. *This Pusey was prepared to do by attachment or other appropriate proceedings, if necessary.* But before taking any legal proceedings, Pusey conferred with Frank Waterhouse & Co. and Frank Waterhouse, in regard to the situation, and upon the arrival in Seattle of Charles B. Smith, the president of the North Alaska Steamship Company, conferences were had between the three. (See deposition of Pusey, Record, p. 479, et seq.)

After Pusey's arrival in Seattle, he was advised from New York that a payment of $5000 had been made on the indebtedness due to appellee, leaving a balance then due from the North Alaska Steamship Co. to the appellee of $10,000, of which $1500 represented interest due on the amounts advanced by the appellee and expenses in connection with the loans and in the securing of the same and obtaining payment, including legal expenses relating thereto and the amount so agreed upon in this regard was afterwards ratified by the North Alaska S. S. Co. (Pusey's deposition, Record, p. 479, et seq.)

The North Alaska S. S. Co. paid to appellee, from time to time, various sums on account of the purchase price of the ship and for permanent betterments to and

supplies furnished her, so that on May 31, 1904, the ship being then about to sail for Alaska, the situation was as follows (see Complainant's Exhibit 19, Record, p. 326). There had been paid to Waterhouse & Co., on account of the purchase price of $85,000, the sum of $47,328.54, leaving still due on this account ----------$37,671.46

There was due Gen. Dodge ----------$10,000.00

In order to arrange for the payment of this indebtedness, and the security of the parties interested, and that the ship might be allowed to sail, Pusey, Smith and Waterhouse then had an interview when it was decided that the amount due appellee, viz.: $10,000, and the amount claimed by the appellant as unpaid upon the purchase price of the steamship "Garonne," viz.: $37,671.46, should be secured by a mortgage aggregating $47,671.46 upon the steamship "Garonne" made in the name of Frank Waterhouse & Co., as trustee, and in fact the mortgage was drawn at that time by the trustee in accordance with this agreement and signed by Smith, as president of the North Alaska S. S. Co. In this mortgage it was expressly provided that the $37,671.46 due Waterhouse & Co. should be a prior lien over the $10,000 due Dodge. Smith also executed a note for $10,000 to Waterhouse & Co. as trustee for Dodge, dated June 2, 1904, and due two months after date. Smith also gave to Waterhouse & Co., as trustee, for Dodge, an assignment of freight moneys to

be earned by the steamer on her contemplated trip North (Pusey's deposition, Record, p. 491), but it does not appear that any money was ever received on this assignment. (See Comp. Exhibits 2 and 4, Rec. pp. 536, 546).

Waterhouse & Co., and Pusey, representing Gen. Dodge, then executed at the request of Waterhouse, the trust agreement set out in Complainant's Exhibit 3 (Record, p. 537).

These several documents, to-wit.: Comp. Exhibits 2, 3 and 4, were given, as appellant well knew, for the purpose of securing the amount due appellee, and accepted by Pusey as such; and in consideration thereof Pusey withdrew his threat of legal proceedings, and permitted the ship to sail. Believing he had protected the rights of Gen. Dodge as far as was possible, and that he was dealing with men of principle, and relying on these several agreements, and that Waterhouse & Co. would faithfully carry out the trust as it agreed to do, Pusey then left Seattle.

The mortgage and a bill of sale from Waterhouse & Co. to North Alaska S. S. Co. of the ship were then forwarded by Waterhouse to the Chase National Bank of New York, with instructions to turn the bill of sale over to the North Alaska S. S. Co. upon its execution of the mortgage. This mortgage was never executed, save by Smith as president of the North Alaska S. S. Co., and the

bill of sale never delivered.

W. F. King seems to have prevented the execution of the mortgage, as part of the plan hereinafter shown.

From the time of the purchase by the North Alaska S. S. Co. until she returned from Alaska, and was surrendered to Waterhouse & Co., the "Garonne" was in the possession of the North Alaska S. S. Co., and made the voyage to Alaska, leaving Seattle June 2, 1904, in its possession, and during said time Frank Waterhouse & Co. acted as agents for the ship, receiving a commission on both receipts and disbursements. (Testimony of King, p. 193, Comp. Exhibit 10, p. 320; testimony of Waterhouse, pp. 155, 173, 174 and 238; Comp. Exhibits 9, p. 316; 11, p. 321; and 19, p. 326).

Neither Dodge nor Pusey heard from Waterhouse & Co. after Pusey left Seattle, until about August 25, 1904 (Pusey's deposition, Record, p. 498), when Pusey received a letter from Waterhouse & Co. dated Aug. 2, 1904, but which, by reason of being misdirected, was returned to Seattle and remailed Aug. 19, 1904. (See Defendant's Exhibit No. 3, Record p. 437, and Complainant's Exhibit 24, Record p. 350). This letter was in reply to letters and telegrams from Pusey asking for information, and *incorrectly* stated, that Waterhouse & Co. had had to assume an indebtedness of $35,000 against the ship, and had subsequently sold her to another party. No amount or name was mentioned.

In the latter part of June, 1904, one William F. King of New York began investigating the situation of affairs of the North Alaska S. S. Co., and sent one Meade to Seattle, with the result that he (Meade), Frank Waterhouse and his attorney, Mr. Bogle, came to New York.

On his arrival at New York Waterhouse demanded that the North Alaska S. S. Co. complete the purchase of the steamer, and pay some $30,000 of indebtedness which Waterhouse claimed was against her. The total of Waterhouse's demand amounted to some $67,000.00, but in it was *not* included Gen. Dodge's claim, nor does it appear that Waterhouse ever alluded to it, or took any means to secure its payment. The North Alaska Company could not meet these demands. Waterhouse (representing the appellant) then turned to W. F. King, who appeared to be the only man of means amongst them, and he and Waterhouse entered into the agreement set out in Complainant's Exhibit 21 (Record, p. 334). In accordance with this agreement a new company was formed by King and Waterhouse, called the Merchants' and Miners' Steamship Co.; capitalized at $100,000 (Comp. Exhibit 25, Rec., p. 351), and the "Garonne" conveyed to said new company for a stated consideration of $167,000.00 (Comp. Exhibit 22, Rec., p. 338); and then by said company mortgaged to King and Waterhouse & Co. to secure the payment of $30,000 to King and $37,000 to Waterhouse & Co. All this *without notice to appellee.* The Merchants' and Miners'

S. S. Co. was incorporated at Waverly, Tioga County, New York, although the negotiations were had and all the parties resided or were then in New York City.

In the bille of sale of Garonne from Waterhouse & Co. to Merchants' and Miners' S. S. Co. (Comp. Exhibit 22, p. 338), the consideration is given at $167,000.00, being the exact amount of the capital stock of the new company, and of the debts against the ship, including the balance of the purchase price due from the North Alaska Company to Waterhouse & Co.

It was testified to that subsequently the Merchants' & Miners' S. S. Co. transferred the steamship Garonne to the White Star S. S. Co., all of which we deem irrelevant to the case, but even if the court will look into that transaction it will be found that there was actually paid to the appellant as stockholder of the Merchants' & Miners' S. S. Co. the sum of $48,500, or over $11,000 more than sufficient to pay the difference due them on the purchase price of the steamship Garonne, so that on the appellant's own testimony it had in hand upwards of $11,000 which should at once be transferred to General Dodge.

During all the time of these negotiations in New York, viz., from July 1st to 10th or 12th, 1904, Gen. Dodge had and maintained an office for business at No. 1 Broadway, open on business days during business hours, and was at his office a part of the time each week, and in telephonic communication with it always. He was a man of

prominence, widely known, and his name and address were in the New York city directory. He was also known personally to W. F. King and to the attorneys for the North Alaska S. S. Co., all of whom were present at these meetings. (See Dodge's testimony, Record, pp. 465, 472, 473). Waterhouse also knew his address in New York, and who he was. (See Record, p. 493, Defendant's Exhibit F 1, Record, p. 394). The place of these meetings was less than a mile from Dodge's offices, and there was telephonic communication between them. (See Rowe's testimony, Record, pp. 69-71; also testimony of Waterhouse for complainant, Record, pp. 156-158). Pusey was also personally known to A. J. Baldwin, attorney for W. F. King, who was present at these meetings. (See Pusey's testimony, Record, p. 499).

But notwithstanding Gen. Dodge's prominence both in the social and business life of New York, and his general reputation throughout the country which was known to Waterhouse, and the fact that Waterhouse admitted to Pusey that he knew Dodge and knew his office address, (see Pusey's deposition, Record, pp. 485, 493, 494), Waterhouse failed to make even an attempt to notify Gen. Dodge of these meetings in New York, and of what it was contemplated doing with the steamer.

At the time the "Garonne" was transferred to the Merchants' and Miners' S. S. Co. she was worth from $90,000 to $100,000. (See testimony of Walker, Rec., p.

122; of Fowler, Rec., p. 128, and of Jackling, Rec., p. 131; also Defendant's Exhibit B, Rec., p. 362.) From June 1, 1904, to April 8, 1905, she was insured for $100,000. (See Complainant's Exhibit 20, Rec., p. 333.) She was purchased by appellant in 1899 in London for 18,000 pounds sterling; had new boilers put in by appellant, at a cost of $44,000, and was in excellent condition when offered for sale to the North Alaska S. S. Co. (See Defendant's Exhibit B, Record, p. 362). In addition to this she had had permanent betterments placed upon her, after she came into the possession of the North Alaska S. S. Co., of at least $20,000, and probably much more. (See Rowe's testimony, Record, p. 72; Jordison's testimony, Record, p. 196; Complainant's Exhibits 9 and 19, Record, pp. 316, 326).

The appellant knew, at the time of the alleged sale of the steamer to the newly created Merchants' & Miners' S. S. Co. that the appellee was abundantly able, financially, to discharge all legitimate claims against her, or due appellant, in order to protect himself. (See Pusey's testimony, Record, pp. 492, 493; also Defendant's Exhibit F 1, Record, p. 394).

POINT ONE.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO DISMISS THE BILL OF COMPLAINT FOR NON-JOINDER OF THE NORTH ALASKA STEAMSHIP COMPANY AS A PARTY DEFENDANT.

The rules as to making persons parties to suits in equity, the method of objecting to the non-joinder of parties and the effect of such non-joinder, as laid down by the decisions of the United States Courts and the Equity Rules of the Supreme Court of the United States may with propriety be first reviewed.

Parties to a suit in equity may be summarized as follows: *Proper parties,* i. e., those who have no interest to be bound, but who may be made parties without misjoinder. *Necessary parties,* i. e., those who may have some possible interest and who, if they are not made parties, may be brought before the court by intervention on their own behalf or on application of one of the other parties to the suit. *Indispensable parties,* i. e., those whose presence is an absolute necessity for a proper final decree.

As to the first two classes of parties, it is a matter of discretion to a great extent whether the court will allow them to intervene or compel the complainant to

make them parties on application of a defendant. One of the rules in regard to non-joinder of a necessary but not indispensable party is that if on the face of the complaint the party appears to be necessary and is not brought in, the objection may be taken by demurrer to the bill of complaint, and if it does not appear on the face of the complaint, then the objection must be taken by plea or answer.

U. S. Equity Rules, 52, 53.

Where the objection is neither taken by demurrer, plea nor answer, it is too late on the hearing to raise the objection.

See *Greenleaf vs. Queen,* 1 Peters, at page 148, where Mr. Justice Washington said:

"As a bill may be dismissed where the plaintiff *when called upon* to make proper parties refuses, or is guilty of unreasonable delay in doing so, need not be questioned. But to do so without a demurrer, plea or answer pointing out the person or persons who the defendant insists ought to be made parties, is unprecedented and would most unquestionably be erroneous. * * * "

Segee vs. Thomas, 3 Blatch., page 11, head note:

"An objection of want of parties must be taken by plea or answer and the name or description of the parties who should be brought before the court must be specified. Such an objection cannot be taken at the hearing for the first time."

Wallace vs. Holmes, 9 Blatch., page 65, head note:

"Where in a suit in equity the want of parties is not set up or suggested in the answer, it cannot avail on final hearing, unless the case is one in which the court cannot proceed to a decree between the parties before it, without

prejudice to the rights of those who are proper to be made parties but who are not brought into court."

Judge Woodruff at page 68 said:

"The want of parties not having been set up or suggested in the defendant's answer herein cannot avail unless the case is one in which the court cannot proceed to a decree between the parties before the court without prejudice to the rights of those who are proper to be made parties, but who are not brought into court."

Story vs. Livingston, 13 Peters, 357, where Mr. Justice Wayne, at page 375, said:

"Besides if there was any force in the objection it comes too late, for where a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, the proper mode to take advantage of it is by plea or answer. If the objection appears on the face of the bill, the defendant may demur."

U. S. Equity Rule 47 provides as follows:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Union Mill & Milling Co. vs. Dangberg et al., 81 Fed. Rep. 73, lays down the rule "if a case in equity can be completely decided *as between the litigant parties,* the fact that there are other persons residing in another state who might have been made parties if they could have

been reached by process should not prevent a decree as to all parties who are within the jurisdiction of the court."

In *Sioux City Terminal R. & W. Co. vs. Trust Co. of North America,* 82 Fed. Rep. 124, it was decided that:

"Under the forty-seventh equity rule, the complainant in a Federal Court need not join any but indispensable parties, when their joinder will oust the jurisdiction; * * *"

The third class of parties are termed *indispensable parties* as was said in *Barney vs. Baltimore City,* 73 U. S. 280-284, by Mr. Justice Miller, after speaking of the first two classes and cases above referred to, goes on to say:

"And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necescity, without which the court cannot proceed, and in *Shields vs. Barrow,* (17 How. 130) they are there said to be persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

See also 16 Cyc. Equity, 189 et sec.

But all parties are dispensable where a decree can be made showing jurisdiction as to the parties before the court without affecting the omitted party's right. A failure to bring him in before the court must be pleaded.

1. No objection was raised by the appellant by demurrer, plea or answer to the non-joiner of the North Alaska Steamship Company as a party defendant, and therefore, unless that company is an indispensable party, the objection raised for the first time on the final hearing came too late.

U. S. Equity Rules, 52, 53.

Segee vs. Thomas, 3 Blatch, 11,

Wallace vs. Holmes, 9 i. d., 65,

Story vs. Livingston, 13 Peters, 357.

2. As joining the North Alaska Steamship Company as a party would oust the court of its jurisdiction, it was proper to omit that company from this suit.

U. S. Equity Rule, 47,

Sioux City Terminal R. & W. Co. vs. Trust Co. of America, 82 Fed. Rep., 124.

3. As the North Alaska Steamship Company was not within the jurisdiction of the court and could not have been served with process, it was proper to omit that company as a party.

U. S. Equity Rule, 47,

Union Mill & Mining Co. vs. Dangberg, 81 Fed. Rep. 73.

It appears upon the face of the complaint that the North Alaska Steamship Company is a resident of the State of New York, of which state the complainant is also a resident, and therefore the joining of that company as a

party defendant in this action would oust the jurisdiction of the court, and moreover being without the jurisdiction of the court, it could not have been reached by the process of the court. Therefore had the objection been taken by demurrer, plea or answer, that objection would not have availed, and the failure to so object is a waiver of the objection, unless that company is an *indispensable* party.

4. The North Alaska Steamship Company is not an *indispensable party.*

(*a*) The appellant makes his first assignment of error as follows:

"The suit is brought to charge this appellant as trustee, with an indebtedness alleged to be owing by the North Alaska Steamship Company to the complainant and appellee, Grenville M. Dodge. In such proceedings the debtor, the North Alaska Steamship Company, was an indispensable party, and the court below erred in entertaining jurisdiction of such cause in the absence of the North Alaska Steamship Company from the record."

The first sentence is a misstatement, in that the suit was *not* brought to charge the appellant, as trustee, with an indebtedness alleged to be owing by the North Alaska Steamship Company to the complainant and appellee, Grenville M. Dodge; but is an action charging the appellant, as trustee, under a trust agreement, dated June 21st, 1904, with breach of trust, by its failure to apply the security which the trustee is charged with, to the payment of a note for $10,000 given by the North Alaska Steamship

Company to the appellant, as trustee for the complainant; and the decree in this action sustains the contention that the appellant has been guilty of a breach of trust, and by reason of parting with the security to the note, which it held for the benefit of the complainant, is charged with the payment of the full amount of the note.

The issues in the case relate solely to the transactions between the appellant and the appellee. The answer admits the making of the trust agreement and the receipt of the note by the appellant as trustee for the complainant, but denies the trust and the duty on the part of the trustee towards its *cestui que trust,* the complainant, and further denies any breach of trust. Therefore the suit, as to all matters relating to the trust, is properly cognizable by a court of equity, and relates solely to the duties and liabilities of the appellant to the complainant, as to which the North Alaska Steamship Company has no interest whatsoever.

(*b*) In the second part of the first assignment of error, the appellant claims as follows:

"In such proceedings the debtor, the North Alaska Steamship Company, was an indispensable party, and the court below erred in entertaining jurisdiction of such cause in the absence of the North Alaska Steamship Company from the record."

The object of this assignment of error is not, as we will hereafter show, made in good faith nor for the protec-

tion of the appellant or of any right of the North Alaska Steamship Company, but solely to defeat the jurisdiction of this court. This is conclusively shown by the letter of Waterhouse & Company, the appellant, to the complainant, dated August 2, 1904 (defendant's Exhibit N—3), in which the appellant says, "*the North Alaska Steamship Company became defunct and has retired from business.*" And further by the exchange of general releases between Waterhouse & Company and the North Alaska Steamship Company any possible theoretical interest which the North Alaska Steamship Company could have otherwise had in this suit was absolutely eliminated.

It also further appears from the evidence that the Circuit Court's finding that the North Alaska Steamship Company appears to have been organized without any capital other than the hopes of its promoters, is true, and that it never had any assets except the contract of purchase of the steamship Garonne, upon which it had paid borrowed money to the extent of $38,000, and was hopelessly insolvent. (Rowe's testimony, 78, 81, 100; also defendant's exhibit N—3, above referred to.)

Let us examine the entire record to see under the principles as laid down by the United States Supreme Court as to who is an indispensable party, what interest, if any, the North Alaska Steamship Company has in the controversy between the appellant and the appellee.

The essential elements of the suit are based upon a transaction which occurred on the second of June, 1904, at which time the trust agreement between the appellant and complainant was signed and the note of the North Alaska Steamship Company given to the appellant as trustee. The circumstances and transactions which lead up to these papers are more in the nature of the history of the proceeding than relating to its essence, and the real controversy starts with June 2nd.

At this point we find the trustee holding a negotiable instrument made to its own order with an equitable mortgage upon the steamship Garonne, and such note is *prima facie* evidence as to its value, and moreover the trustee is estopped from questioning the amount due on this note by reason of the recital in the trust agreement and in the transactions which then occurred by which the appellee, relying upon the note and the trust agreement, permitted the steamship Garonne to sail from Seattle, and took no action in Seattle to collect the amount then due to complainant from the North Alaska Steamship Company.

The consideration of the trust agreement was the forebearance on the part of the complainant from pursuing his legal right of action against the steamship Garonne and the North Alaska Steamship Company. Based upon this consideration it will appear from the trust agreement that the appellant was incontrovertibly bound by the recital of the amount due to the complainant and by its covenant

to take a mortgage to secure that amount. To allow any evidence on the part of the North Alaska Steamship Company or of the appellant to vary that amount, would be against the fundamental principal of law, that parol evidence is not admissable to vary the terms of a written contract.

See *Goodwin v. Fox,* 129 U. S., page 601, at page 632.

Now, if nothing further had been done between the appellant and the North Alaska Steamship Company to make that company an unnecessary party, nevertheless the appellant would still have been the only necessary party to a suit, and any question in regard to the value of the note or the amount due thereon would have had to have been affirmatively pleaded by the appellant. If the appellant had any equitable defense against being charged with the note or wished to plead payment, that was a matter for them to have pleaded in their answer and to have proved. When the note became due on August 2nd, the appellant could have brought suit on the note and have determined whether there was any possible defense to it. In other words the trustee should have protected himself. In an action brought against a trustee, to account for the securities in his hands, he cannot, in a court of equity, oust the court of jurisdiction on the ground that the makers of the securities should be joined as parties defendant, in order to determine the amount due thereon. For instance, can a trustee, holding bonds of the United States,

when called upon to account for the bonds, say that the United States should be made a party in order to prove how much they owe on the bond? In such a suit, should a railroad company or any other corporation issuing bonds or promissory notes, be made a party to prove the amount due? Clearly not.

This case is not like the case of *Saloy vs. Bloch,* 136 U. S. 338, for in that case *there was an action at law* against a party who had agreed to subordinate a prior lien to an inferior lien, and the court there held that there was no legal cause of action, and by way of *obiter dicta* said that the inferior lien being for an unliquidated amount, it might be necessary in a suit in equity to make the debtor a party, in order to determine what the amount was concerning which the superior lienor had subordinated his claim. But this is a case of a liquidated claim re-presented by a promissory note in the hands of the trustee, and there is no principle of law or equity that we have been able to discover which would require bringing the maker of the note into court in order to prove the amount due. This suit is against the appellant as trustee to declare the amount of the note a lien upon the steamship Garonne in his hands, and he having parted with the security to charge him personally with the damage to the complainant.

A case more nearly in point is *Wells vs. Knox,* 55 Hun. (N. Y.) 245, where it was held that a general cred-

itor under an assignment for the benefit of creditors was entitled to sue the assignee for an accounting without making the assignor a party, where the assignor had died and there were no personal representatives. There Judge Van Brunt said:

"It is to be borne in mind that there are many instances in which persons may be proper parties to an action who are not necessary parties, and that much which has been said upon the subject of making the assignor a party in actions of this character must be viewed in reference to the fact that a person may be a proper party although not a necessary party. The object of the proceeding upon the part of the plaintiff was not to recover the debt from his debtor, but to prosecute the lien which he had because of his debt upon the funds in the hands of the assignee, which lien was given by an assignment under which the assignee held the property upon which it was sought to impress this lien. If this was a proceeding to recover the debt as such against the debtor, undoubtedly the debtor or his legal representative would be a necessary party to the action, but as already suggested that is not the nature of the relief sought, such relief being merely to reach certain property and nothing else."

In the case at bar the complainant is not seeking to recover his debt as such from the appellant, but to make the appellant account for the security which he had and with which he is chargeable, and out of that security to pay the amount of the note given to the trustee.

See also *Putnam et al. vs. Timothy Dry Goods & Carpet Co. et al.*, 79 Fed. Rep. 454.

See also the *Matter of Carpenter,* 45 Hun. (N. Y.) page 552.

At page 558 the court says:

"It is urged that the inaction of the creditors Bliss and Allen, to take steps themselves to recover this property is a defense to Cornell. We think not. Cornell was their trustee; bound to faithful discharge of duty for their benefit. He had taken the property of their debtor and thus had to some extent deprived them of the opportunity of collecting their debt therefrom. It has never been held that a trustee was not liable for breach of trust, because his *cestui que trust* might have brought an action to redress the wrong done to the trust estate."

The terms of the trust agreement of June 2, 1904, which were based upon an adequate consideration, fixes as between the complainant and Frank Waterhouse & Co., the balance due from the North Alaska Steamship Company to Waterhouse & Co. conclusively at $37,671.36, and equally conclusively fixes the amount due to the complainant at $10,000, and Waterhouse & Co. covenants that it shall take a mortgage from the North Alaska Steamship Company upon the steamship Garonne to secure both claims above mentioned, and shall take a note from said North Alaska Steamship Company payable to them as trustee, for the amount so owing to said Dodge, and at the same time the North Alaska Steamship Company then and there delivered to the appellant as trustee for the complainant a note for $10,000, and the president of the North Alaska Steamship Company signed the mortgage referred to in the trust agreement. There was further delivered to the appellant, as trustee, an assignment of $5,000 of freight

moneys to be earned on the voyage to Alaska. Judge Hanford, in his opinion in the court below, said: "I hold * * * that the mortgage which was signed by the president of the steamship company, the promissory note for $10,000 given to the defendant as trustee for the complainant, the assignment of the freight money and the contract signed by the defendant and Pusey, as agent for the complainant, constitute one contract, binding upon all three of the parties." That being so, the presence of the North Alaska Steamship Company as a party to the suit, could not in any way avail the defendant as to its liability to the complainant in this action.

The appellant is further concluded from questioning the amount due on the note, for the reason that the note was made to the appellant as trustee, and whatever indebtedness there was prior to June 2, 1904, from the North Alaska Steamship Company to the complainant, such indebtedness was transferred to the appellant as trustee, and it does not lie in the mouth of the trustee holding the note to say that the complainant must call for an accounting from the North Alaska Steamship Company, the maker of the note. The cause of action on the note was between the trustee and the maker, and what he is now seeking to do is to defeat the complainant's right of recovery by reason of the appellant's own laches in failing to collect the note, or of satisfying itself as to the amount due—if there is any question on that subject. This a court of

equity will not permit. Moreover, parol evidence to vary the terms of a written instrument is not admissable.

Sturmdorf vs. Saunders, 117 App. Div. (N. Y.) 762.

c. The releases exchanged were general releases, and constituted a complete estoppel.

The appellant contends that it would be entitled to recover of the North Alaska Steamship Company the amount of any judgment rendered against it in this action, and therefore this latter company should be a party and concluded by the decree, as otherwise on a suit against it by appellant, it might be able to show that it did not owe the appellee anything. But the Circuit Court held that the North Alaska Steamship Company was not a necessary or proper party; that it had no interest to be affected by the litigation, as the releases exchanged between it and the appellant created an estoppel which would prevent either party recovering from the other for any claims arising prior to the date thereof. This being so, the release from Waterhouse to the steamship company could be effectually pleaded by the latter in bar of any action brought by Waterhouse against it, and consequently rendered it (i. e., the steamship company), a wholly unnecessary party to the suit.

The release from Waterhouse to the North Alaska

Steamship Company is as follows: (See Deft's. Exhibit Q. 3, Record, 456.)

"To all to whom these presents shall come or may concern, Greeting: Know ye that Frank Waterhouse and Company, a corporation having its principal office at Seattle, State of Washington, for and in consideration of the sum of one dollar ($1.00) lawful money of the United States of America, to it in hand paid by The North Alaska Steamship Company, a corporation having its principal office at the City of New York, State of New York, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these presents do for itself, its successors and assigns remise, release and forever discharge the said North Alaska Steamship Company, its successors and assigns, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims or demands whatsoever *in law or in equity,* which against The North Alaska Steamship Company, its successors and assigns ever had, now has or which its successors and assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of the date of these presents.

In witness whereof the said Frank Waterhouse & Company has by the hands of its President and Secretary executed this instrument and affixed a seal on the ninth day of July, 1904.

State of New York }
} ss.
County of New York }

On this 9th day of July, 1904, before me personally came William Bogle, to me known, who, being duly sworn, did depose and say that he resided in Seattle, State of Washington; that he is the secretary of Frank Waterhouse & Company, the corporation described in and which executed the above instrument; that he signed his name there-

to with the intent to bind the said corporation to the terms hereof.

THOMAS H. McKEE,
Notary Public, New York County."

An exactly similar release was executed by the North Alaska Steamship Co. to Waterhouse & Co. On this point Bogle testifies (see Bogle's testimony, p. 280).

"I have here a copy of the release executed by Frank Waterhouse & Company to the North Alaska Steamship Company. The release executed by the North Alaska Steamship Company to Frank Waterhouse & Company was in the same form as the copy now presented, except that it was executed by the North Alaska Steamship Company to Frank Waterhouse & Company instead of by Frank Waterhouse & Company to them. I herewith hand the master a copy of the release referred to, and ask that it be marked as an exhibit to my deposition."

(Document produced and presented by the witness is marked defendants' exhibit "Q—3," p. 456.)

These releases are as full and comprehensive as it is possible for words to make them. On the exchange of these releases the "Garonne," which was Dodge's security, was turned over absolutely, to Waterhouse & Co., without any reservation. No equity remained in the North Alaska Steamship Co. Whatever Waterhouse & Co. did with the steamer—whatever price it sold her for and whether there was a surplus over, after all claims were paid—would give the North Alaska Steamship Co. no right of action.

On the other hand, the release from Waterhouse & Co.

to the North Alaska Steamship Co. was an effectual safeguard to the latter against any claim made by Waterhouse & Co. and as effectual a bar to Waterhouse & Co. if it made any such claims. Under these circumstances, it is difficult to see what possible interest the North Alaska Steamship Co. could have in this litigation, which arises over the failure of Waterhouse & Co. to use their security for the protection of Dodge, in accordance with the trust agreement.

Counsel for appellant contends, however, that this is a proceeding to collect a debt out of or from the assets of the North Alaska Steamship Co., and that, therefore, the latter is a necessary party. But from the moment the steamer passed to Waterhouse & Co. upon the exchange of the releases, she ceased to be an asset of the North Alaska Steamship Co. and became the property of Waterhouse & Co., free from all claim as far as the North Alaska Steamship Co. is concerned; and what we are trying to do is to make Waterhouse & Co. account for trust property which has come into its absolute and undisputed possession, and which it secretly disposed of.

As regards releases, it is laid down that where there is a particular recital and general words follow, that the general words will be qualified by the particular recital; but where *general words only are used,* the release is construed most strongly against the party executing it, and is held to include all demands embraced by its terms,

whether particularly contemplated or not; and as a corollary from the above it follows, and is so held, that a release cannot be varied by parol evidence to show that a certain claim was not in the minds of the parties.

24*Am. & Eng. Ency. Law,* 2nd Ed., p. 294.

Kirchner vs. New Home S. M. Co. (N. Y.), 31 N. E. Rep. 1104.

Pierson vs. Hooker, 3 Johns. (N. Y.) 70.

The Cayuga (C. C. A., 6th Circuit), 59 Fed. Rep. 483.

One of the earliest cases is *Pierson vs. Hooker* (3 Johns 70), where Chief Justice Kent said:

"But the instrument is general and comprehensive, and expressly reaches to every debt and demand of every kind. To show by parol proof that it was not so intended is to contradict or explain away the instrument, which is contrary to the established rule of law."

And, following this decision, the Court of Appeals of New York has held in *Kirchner vs. New Home S. M. Co.* (31 N. E. 1104):

"Construing the language of a release, as we must, most strongly against the grantor, if words are used fairly importing a general discharge, their effect cannot be limited by the bare proof that the releasor had no knowledge of the existence of the demand in controversy. The operation of such an instrument cannot be made to depend upon oral testimony as to the knowledge of the creditor when he executed it, of the liability which he subsequently seeks to enforce."

In the case of *The Cayuga* (59 Fed. 483), the Circuit Court of appeals (6th Circuit) states of a general release:

"It was a release, under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of a contract, and could no more be disputed or controlled by parol evidence than any other instrument of writing witnessing an agreement of parties. A release is held to include all demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence that a certain claim was not in the minds of the parties is not admissible."

The North Alaska Steamship Co. turned over the ship only on being released from *all* claims. Many of these claims were unknown to the steamship company. Waterhouse & Co. showed no itemized statement of the claims, but only a telegram from its bookkeeper in Seattle giving the gross amount of the claims (see Waterhouse's testimoney for complainant, p. 189, and Complainant's Exhibit 11, p. 321), and to make up this amount Waterhouse & Co. included some claims not then even in existence(see Waterhouse's testimony for complainant, pp. 181, 186, 187, and Complainant's Exhibits 15 and 17, p. 325, 326). But the claim of the appellee was known to both Waterhouse & Co. and to the North Alaska Steamship Co. at the "time of the exchange of the releases and long before." The entire evidence conclusively shows this, and as conclusively shows that appellee's claim was not forgotten or overlooked in this settlement, but, as far as Waterhouse & Co. was concerned, at least, was purposely ignored. Waterhouse well knew

the steamer and her value. However, had the North Alaska Steamship Co. paid not only what it owed Waterhouse & Co. upon the agreed purchase price of the steamer, but also the thirty odd thousand dollars which the latter was claiming as liens against the steamer (of which appellee's claim formed no part), still Waterhouse & Co. would not have been justified in turning over the steamer to the North Alaska Co. without protecting the appellee's claim, of which he was trustee. Can it then be allowed to take the steamer (and thereby the entire assets of the North Alaska Co.), at much less than her real value, in payment of these claims, giving and receiving acquittances in full for all claims,—and yet say that in this settlement the appellee's claim was neither contemplated nor included by either of the parties, although the claim was well known to both?

The appellant has no right of recovery over against the North Alaska Steamship Company for any amount decreed in this action to be paid by the appellant to the complainant, (1) on account of the general releases, (2) by reason of the insolvency of the North Alaska Steamship Company and its becoming defunct and retiring from business. There remains as the only possible ground for making the North Alaska Steamship Company a party, that it would assist the appellant in reducing the amount of the note. But this is not a ground for bringing in a party, but is a matter of affirmative defense to be pleaded

and proven by the appellant. The presence of the North Alaska Steamship Company in the suit is not that it would be bound by the decree, but that it should give evidence of the amount due. This could have been accomplished by the appellant's examining the then officers of the North Alaska Steamship Company as witnesses. It must be perfectly apparent to the court that the appellant, by its failure to plead or prove anything in reduction of the amount due, must have been satisfied that it could not change that amount, and that therefore it purposely omitted the attempt, hoping thereby to raise a fictitious objection purely technical and without merit, so as to get this case dismissed, not upon the merits of the case, but upon a purely inequitable and fictitious claim made for the first time upon the hearing, that in some way or other the North Alaska Steamship Company should have been made a party.

We think we have conclusively shown that the appellant has not and can not be prejudiced in any way by reason of the non-joinder of the North Alaska Steamship Company as a party defendant, that full equity can be decreed between the parties without bringing in said company; that the necessity of making said company a party is urged not for its protection or for equity but to defeat the jurisdiction of this court, and that the appellant has failed to raise its objections to the alleged defect of parties in proper manner and at proper time.

If the court should decide that there should be some more formal proof as to the amount due, then, we contend, there nevertheless is sufficient *at issue* before this court between the parties to warrant a decree determining the issues presented by the pleadings, and directing the trustee to pay into court a sufficient amount to stand as security in place of the steamship Garonne until the amount due on the note has been proven to the satisfaction of this court.

These issues upon which we contend a decree should in any event be made are the following:

(a) That Frank Waterhouse & Co. was a trustee under the agreement of June 2, 1904, to take a mortgage to secure themselves and complainant upon the steamship Garonne.

(b) That, as trustee, it held for complainant's benefit a note for $10,000.

(c) That it is considered in equity as having delivered the steamship Garonne to the North Alaska Steamship Company, and of having taken back a mortgage, as provided for, under the trust agreement.

(d) That the redelivery of the steamship Garonne to Frank Waterhouse & Co. in July, 1904, was equivalent to the foreclosure of the mortgage and the buying in of the steamship Garonne, which was then held as trust property by the trustee charged with the lien of the $10,000 note.

(e) That the steamship Garonne was at that time of sufficient value to pay all prior liens and the said note of $10,000.

(f) That Frank Waterhouse & Co. was guilty of breach of trust in parting with the security for the note and became thereby personally liable to the complainant for the amount of the note (or, at least, whatever was due from the steamship company to the complainant).

POINT TWO.

NO ERROR WAS COMMITTED BY THE COURT BELOW IN RENDERING A DECREE IN FAVOR OF APPELLEE, FOR THE SUM IT DID, OR IN REFUSING TO RENDER A DECREE DISMISSING THE ACTION.

It is the contention of the appellee, in the court below, and in this court, that the following propositions were clearly established by the evidence, and justified by the law, in the case; and in sustaining these propositions we now contend the trial court committed no error:

We will discuss these propositions *seriatim*:

First. That by the execution of the trust agreement (set out in Complainant's Exhibit 3) Waterhouse & Co. in-

duced General Dodge to abstain from attaching the freight money or tying up the ship—either of which would have entailed serious loss to appellant—and the appellee was fully entitled to rely and did rely upon that agreement, believing it would be faithfully carried out. By that agreement Waterhouse & Co. became the trustee of appellee, and was bound—not only by the terms of the agreement, but in law, and good conscience—to carry out the trust in absolute good faith, and to the full extent of its powers to protect the appellee's interest in the steamer.

The relationship between Gen. Dodge and Waterhouse & Co. may be said to have commenced with the interview between Mr. Pusey and Mr. Waterhouse at Seattle, on or about June 1, 1904. Waterhouse was then informed by Pusey of the claim of Gen. Dodge, and Pusey insisted on a satisfactory settlement of the same, or, if no settlement were made threatened to take legal proceedings. This would have resulted in stopping the contemplated voyage, and that the ship should sail as proposed was greatly to the interest of Waterhouse & Co. and of the North Alaska S. S. Co.

All this appears clearly, not only by Pusey's testimony (Record, p. 479), which is nowhere contradicted, but also by the testimony of Waterhouse and Bogle (Record, p. 216). It is true Waterhouse in his testimony tries to show that the indebtedness Pusey was seeking

to have paid was a private matter between Smith and Dodge (Record, p. 217), but Bogle's testimony shows differently. He says: "It was explained to me that Mr. Pusey represented Gen. G. M. Dodge of New York, and that Gen. Dodge held a claim *against the North Alaska Steamship Company* for some $10,000." (Record, p. 264.) Appellant also states in its answer: "That said Smith and said Pusey agreed that said North Alaska Steamship Co. was indebted to said complainant in the sum of ten thousand dollars." (Record, p. 22.)

Then Complainant's Exhibit 1 (Record, p. 531) is a duly executed instrument of the North Alaska Steamship Co., acknowledging the debt; and the testimony of Rowe (Record, p. 107) and of Pusey (Record, p. 479) shows conclusively that the money borrowed from Dodge was used to make a payment on the steamer "Garonne," and therefore for the benefit of the North Alaska S. S. Co. Finally, in the trust agreement itself (Complainant's Exhibit 3, p. 537) it is expressly stated that the North Alaska Steamship Co. is indebted to G. M. Dodge for $10,000 borrowed money.

All this testimony, coupled with the fact that Waterhouse & Co. afterwards took the memo. agreement, note and mortgage, as trustee for Dodge, we think disposes of any claims that this indebtedness was a private transaction between Smith and Dodge.

There was, beyond question, sufficient interest of the

North Alaska Steamship Co. in the ship on the 2nd of June, 1904, to have enabled Gen. Dodge to have secured his claim for $10,000 by legal proceedings. And moreover by complainant's exhibit 19 it appears that there was due at that time to the North Alaska Steamship Co. cash from W. H. Ferguson, traffic manager, L. H. Gray & Co., Arlington Dock Co. and Alaska Pacific Navigation Co. of upwards of $20,000, which Gen. Dodge could have attached in the state courts at Seattle and thus secured his claim.

It was under these circumstances that the trust agreement (Complainant's Exhibit 3, Record, p. 537) was executed. Pusey placed entire confidence in Waterhouse & Co. The note for $10,000 for Dodge's claim ran to it; the mortgage securing both interests was in its name alone; and it was to receive and remit to Dodge any moneys received from Alaska.

The evidence (Record, p. 486) clearly shows that when Pusey went to Seattle to protect appellee's claim he was prepared to bring suit and enforce it, and only refrained from doing so upon the faith of the trust agreement signed by Waterhouse & Co., and at the earnest solicitation of both Smith and Waterhouse. A suit would probably have been successful; at any rate, it would have resulted in tying up the steamer and delaying the voyage, which would have resulted in serious loss to both Waterhouse & Co. and the North Alaska Steamship Co. But

it is not material whether the suit would have been successful or not. *Forbearance in bringing a suit at law or in equity is a valuable consideration.*

Parsons on Contracts, Book 2, Chap. 1, sec. 5, Vol. 1, page 441.

Hammer v. Sidway, 124 N. Y. 538, 27 N. E. Rep. 256.

Defendant's Exhibit X (Record, p. 386) shows that the condition of the steamer was fully explained to Pusey at the time he was in Seattle, and in the words of the exhibit, he considered her a "very valuable asset." That he was confirmed in this belief by the defendant, Waterhouse, will not admit of question. In fact, throughout the whole testimony, in all his correspondence, Waterhouse is constantly insisting that the ship is in first class condition, and an exceedingly valuable and profitable piece of property—never having been operated at a loss, etc. (See Defendants' Exhibits B, R and X (Record, pp. 363, 378, 386.)

The evidence also shows that this trust agreement was drawn up by appellant's attorney, and carefully considered before being signed. (See Bogle's testimony, Record, pp. 266, 268.)

Relying upon the promises made him, and the paper writings executed by Waterhouse & Co., and believing he had protected the interests of Dodge as fully as possible

under the circumstances, and that the trust assumed by Waterhouse & Co. would be carried out—as Waterhouse & Co. agreed to carry it out—in good faith—Pusey left Seattle.

Second—That the mortgage which was to be executed (see Complainant's Exhibit 4, Record, p. 538) was, under the doctrine that equity will consider that done which ought to have been done, an equitable mortgage; and that so long as the title to the ship was in Waterhouse & Co., it was able to protect the interest of the appellee in the ship as fully as if the title to the ship had passed to the North Alaska S. S. Co., and the mortgage had been duly executed and delivered.

On this question the learned Judge of the Court below said:

"I hold, however, that the mortgage which was signed by the President of the Steamship Company, the promissory note for ten thousand dollars, given to the defendant as trustee for the complainant, the assignment of the freight money, and the contract signed by the defendant and Pusey as agent for the complainant, constitute one contract, binding upon all three of the parties. The documentary evidence in the case proves that notice of the transaction was promptly sent to the secretary of the Steamship Company in New York, and that Smith's authority as president of the Company was not disputed. The evidence also proves that there was more than a mere executory contract to sell the steamship to the North Alaska Steamship Company, because the sale was

consummated by complete manual delivery of the ship to the purchaser, and she was permitted to leave port of Seattle under control of the purchaser in consideration of the contract, and that she earned money for the purchaser; therefore the defendant held the legal title subject to the trust created by said contract, and except as against other creditors and *bona fide* purchasers, the ship was effectually hypothecated for the complainant's debt." (Record, p. 566.)

It is a well established maxim of equity that "Equity considers that done which ought to have been done," and although this mortgage was not, in fact, finally executed by the officers of the North Alaska S. S. Co., other than Smith, was, nevertheless, a mortgage to all intents and purposes—in other words, an equitable mortgage.

"The whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done and ought to have been done. In order to apply this maxim according to its true meaning the court will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, * * * always regarding the substance and not the form of the transaction."

Sprague vs. Cochran (N. Y.), 38 N. E. Rep. 1000, citing Story Equity Jur., secs. 64g, 156.

In the case of *Ketchum vs. St. Louis,* 101 U. S. Co-op. Ed. 999 (11 Otto, 306), Mr. Justice Harlan, speaking of this subject, cites with approval the following by Lord Thurlow in *Legard vs. Hodges,* 1 Ves. Jr. 478: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of

he was financially able to avail himself of it admits of no doubt (Record, p. 493), and considering the value of the steamer as established by the evidence, it would clearly have been his interest to do so. When he was deprived of this right, which was a valuable right, in the way set forth in the evidence, then a court of equity will grant him relief to the full extent of the wrong he has suffered.

The facts, and they are uncontradicted, that Waterhouse knew of Gen. Dodge's general reputation; knew his financial condition; and knew his office address (Record, pp. 485, 491); and knowing all these made no effort either to have him present or to notify him of the meetings in New York—and these meetings extended over some 10 days—seems to us to afford conclusive proof that, from the time of making the deal with King, Waterhouse had determined to regain possession of and title to the steamer in fraud of Gen. Dodge's claims.

At the time of the sale of the "Garonne" to the Miners & Merchants' Company, she was reasonably worth $100,000. We think the evidence unmistakably shows this. The testimony of Walker (Record, p. 122), who is a marine engineer and naval architect, places the value at $86,000 to $90,000. The testimony of Fowler (Record, p. 128), who was Lloyd's agent at Seattle and who examined and valued the ship for Waterhouse & Co., places the same at $95,000. The testimony of Jackling (Record,

p. 131), who was a marine engineer of twenty-five years' experience and knew the ship, placed the value at $100,000 to $125,000. In addition to this she was constantly kept insured for $100,000 (Comp. Ex. 20). Waterhouse contracted to sell her for $85,000 (Record, p. 141), and there was at least $30,000 of permanent improvements put on her afterwards and probably much more (Record, pp. 317, 328). Then Waterhouse's estimate of the ship is clearly shown by his own testimony in his letter dated January 26, 1904 (see Defendants' Exhibit B, Record p. 362), he states that she was examined thoroughly by the superintendent engineer of the Pacific Coast Steamship Company a few months previous, who reported that her hull alone was worth $100,000; that her engines were in good condition; that $44,000 had been expended on her boilers only two years previous; that her furnaces, boiler tubes and combustion chambers were new and the boilers in first class condition; that he bought the boat in London in 1899 for 18,000 pounds sterling, or a little less than $90,000, and that her condition had been greatly bettered in the meantime on account of the large amount of money expended on her boilers; that her equipment had been carefully taken care of; that he had *never made an unprofitable voyage to Alaska with her.* He also states (see Defendants' Exhibit R, Record p. 378), under date of June, 1904, that, had he not sold her to the North Alaska Steamship Company, he could have sold her to

other parties on the same date for the same amount. Her value must be estimated at what she was fairly worth at Seattle on the day she was sold to the Miners & Merchants' Steamship Company. Any evidence of what it was necessary or advantageously to sell her for in Europe, after she had been through a tumultuous voyage and abandoned by her charterer is immaterial and irrelevant.

Even were there no testimony as to the value of the Garonne, for the purposes of this action, she must be worth $167,000 for the following reasons:

At the time the "Garonne" was conveyed to the Merchants & Miners S. S. Co. in consummation of the scheme between appellant and W. F. King, the evidence shows that, as between the parties to this transfer the ship was considered to be, and must be conclusively held to have been worth $167,000.00. (Comp. Exhibit 22, Rec. p. 338). While this sum may be in excess of the value fixed by other testimony, still it was the value fixed by the parties, which they had a right to do, and which they cannot now be allowed to contradict. In fact they have not tried to contradict it. On this value they made their bargain and reaped their profits.

Notwithstanding the claim of appellant that the stock of the Merchants and Miners' S. S. Co. was not actually issued, it was in law issued, whether the manual work of signing the certificates had occurred or not, and the com-

pany filed a certificate with the Secretary of State of New York (Complainant's Exhibit 26, Record p. 357) which shows that the whole capital stock had been paid for, and by reference to Waterhouse's testimony for complainant (Record, p. 133), it will appear that it was fully paid for by the steamship Garonne, and therefore the value of the steamship Garonne at $100,000 over and above any indebtedness against her is by the laws of New York made absolutely conclusive. See Article 3, Section 42 of the Stock Corporation Law of the State of New York in effect April 16, 1901, which reads as follows:

Sec. 42. CONSIDERATION FOR ISSUE OF STOCKS AND BONDS:

"No corporation shall issue stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of corporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased."

The United States Courts will take judicial notice of the public statutes of each state.

Lamar vs. Micou, 114 U. S. 218.

Mills vs. Green, 159 U. S. 651.

As the stock represented the ship and was the only asset of the company, the effect of this was to convey the ship jointly to Waterhouse & Company and King in equal proportions (see Waterhouse's testimony for defendants, Record p. 133). The transfer of the ship fully paid for the stock and the officers of the company certified that the stock was fully paid up. (See Complainant's Exhibit 26, Record p. 357), so that at this point it appears that the benefits which the appellant obtained while in New York in July, 1904, was stock of a corporation which as to them at least was conclusively worth $50,000 over and above the balance due on the purchase price of the ship.

There is no doubt that the profit to Waterhouse & Co. by the agreement with King and his associates, and the sale to the Merchants & Miners' Co., and subsequent sale to the White Star Co., was large—more than enough to have paid off what was owing to the complainant. Waterhouse & Co. received $48,500 in stock of the White Star S. S. Co., while at the time of the sale to King he only claimed an unpaid balance of $37,671.46 on the purchase price, and this stock was practically fully paid, and will,

therefore, be presumed to be, and undoubtedly was, worth par. (See testimony of Bogle, Record p. 249, 308).

Appellant put in a mass of documentary testimony tending to show that the North Alaska Steamship Co. failed to carry out its obligations to Waterhouse & Co. and failed to execute the mortgage to secure Gen. Dodge and Waterhouse & Co. But there is no testimony that notice of this failure was ever given to Gen. Dodge, and he given an opportunity to protect himself. Waterhouse never attempted to communicate with Gen. Dodge, and it was not until after both a telegram and a letter from Pusey, to Waterhouse & Co. at Seattle, asking him what the situation of affairs was, was there any communication whatever between the trustee and Cestui Que Trust. Then came a most astonishing letter from a trustee, disregarding all his duties, making misstatements, and throwing the trust agreement and papers back to Gen. Dodge, saying that he was unable to do anything for him.

Taking the testimony as a whole, and considering it in the light of all the surrounding circumstances, it is impossible to reach any other conclusion than that the rights of Gen. Dodge were deliberately sacrificed at the series of meetings in New York, culminating in the sale of the ship to the newly formed Merchants & Miners Steamship Co. It cannot be said—although it would be no legal excuse were it so—that Gen. Dodge's rights were unintentionally overlooked. They were at all times well known to Frank

Waterhouse, and he was intimately connected with, and personally interested in all the ramifications through which the title to the ship passed until her final disposition.

Frank Waterhouse was president and chief stockholder in Frank Waterhouse & Co.; he was president, and equal stockholder with King in the Merchants & Miners Co.; and he was a stockholder and president of the White Star Co., to which the ship was afterwards sold. Waterhouse was the dominant factor and guiding spirit in all that was done in New York.

And if the appellant's only purpose was to protect itself for what still remained due it for the purchase of the ship and the debts against her, the sacrifice was a needless one; for the value of the ship was amply sufficient to cover all these claims and Gen. Dodge's claim as well. Of this there can be no doubt. The testimony of the appellee as to the value of the ship was not contradicted—there was not even an attempt at contradiction—notwithstanding the ship was known in Seattle for years.

But it is idle to say that appellant's object at these New York meetings was only to protect itself. The testimony shows that it bent every effort to get back the ship —well worth $100,000—at as little risk and as great a profit to itself as possible. To have acknowledged Gen. Dodge's claim at that time would have decreased that profit by some $10,000; and therefore the claim was ignored and the profits increased correspondingly.

This was done with full knowledge of appellee's rights, which appellant was bound not only by written agreement but by every principle of honesty, good faith and business decency to protect; done with full knowledge of Gen. Dodge's ability to protect his own and all other interests in the vessel, had he had the opportunity; and done within a stone's throw of his office, where a telephone call would have reached him at any time. Then, when he learned how he had been defrauded, and called his trustee to account, Waterhouse, expressing a feeling of "surprise and annoyance" that he should be even asked for an explanation, returns the papers to complainant with the statement—palpably false—that he had "no opportunity of protecting your claim."

Gen. Dodge has acted with the utmost good faith throughout this entire transaction, and he is here now, asking a Court of Equity what he believes he is entitled to under the law and under every rule of equity and good conscience—under every rule of fair and upright dealing amongst honorable business men—viz: the return of the money out of which he has been defrauded by the appellant.

We most respectfully submit that the decree of the Honorable Circuit Court was eminently right, and should be affirmed.

Respectfully submitted,

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Of Counsel.

equity, as against the party himself, and any claiming under him, voluntarily or without notice, raised a trust."

"There is generally no difficulty in equity in establishing a lien, * * * wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice, for it is a general principle in equity that as against the party himself and any claiming under him voluntarily or with notice, such an agreement raises a trust."

Story, Eq. Jur., vol. II, sec. 1231.

Pinch vs. Anthony, 8 Allen (Mass.) 536.

A court of equity will treat an agreement for a mortgage or pledge of personal property as binding, and will give it effect according to the intention of the contracting parties.

White Water Co. vs. Vallette, 21 Howard 414 (62 U. S. Co-op. Ed., 154).

See also:

3 *Pom. Eq. Jur.,* secs. 1235, 1237.

Gest vs. Packwood, 39 Fed. Rep. 533.

Bridgeport, &c. Co. vs. Meader, 72 Fed. Rep. 118.

Love vs. Sierra, &c. Mining Co., 32 Cal. 639.

The paper title of the steamship "Garonne" was in Waterhouse & Co. on the 2nd day of June, and remained in them until after the transfer to the Merchants & Miners Steamship Co., therefore the agreement to take a mortgage as effectually mortgaged the boat, while in the hands of Waterhouse & Co., as though the mortgage had been executed, and the fact that the mortgage was not executed has not the slightest bearing upon the lia-

bility of Waterhouse & Co. as the holders of a mortgage. The reason for taking the mortgage was based upon the idea that Waterhouse & Co. would put the title of the steamship in the North Alaska S. S. Co., and that, in order to protect Waterhouse & Co. and Gen. Dodge, it would then be necessary for the North Alaska S. S. Co. to execute a mortgage back to Waterhouse & Co.; but so long as the paper title did not pass out of Waterhouse & Co. there was no necessity for the North Alaska S. S. Co. to execute the mortgage, in order that Waterhouse & Co. should hold the boat, or hold a lien on the boat, as trustee for itself and Gen. Dodge. In other words, the declaration of trust by Waterhouse & Co., so long as the title to the "Garonne" remained in Waterhouse & Co., was as effectual for the protection of Gen. Dodge as though the vessel had been transferred to the North Alaska S. S. Co., subject to a mortgage back to Waterhouse & Co.

The ship was allowed to sail only on the strength of the mortgage and trust agreement entered into for the protection of Gen. Dodge. That she should sail was manifestly to the interest of and was desired by the appellant and the North Alaska S. S. Co.; and Pusey would not have permitted her sailing had he not felt sure the agreements entered into be carried out, and that the trust assumed by Waterhouse & Co. would have been faithfully executed as it agreed to execute it in good faith.

Third—That the appellant, knowing the interest of the appellee in the ship and knowing his address, and knowing that the actual value of the ship was greatly in excess of the claims against her and the amount due Waterhouse & Co. on the purchase price, and that the appellee was financially able to protect his interest in the ship, if he received notice, fraudulently planned and conspired with W. F. King and his associates to obtain the title to the ship to the exclusion of the right of the appellee, and in bad faith and in violation of the trust existing between Waterhouse & Co. and the appellee.

Fourth—If there was no actual fraudulent combination between King and his associates and the appellant to obtain the absolute ownership of the steamship Garonne freed from the trust to Dodge, yet the action of the appellant was nevertheless a fraud in law and a violation of the trust agreement, in that it was a repudiation of the trust agreement, for the purpose of gaining a personal profit over and above the just amount due to the appellant, and such personal profit was in fact obtained to the extent of $50,000 in stock of the Merchants & Miners Steamship Company, which stock was, as to the appellant, conclusively worth $50,000.

The third and fourth propositions are so closely connected that they may be discussed together.

About the 1st of July, 1904, Mr. Waterhouse, and his attorney, Mr. Bogle, went to New York. At this time there was a balance due on the purchase price of the ship of $37,671.46, and on claims against the vessel or against the North Alaska Steamship Company (a large part of which were for commissions due Waterhouse) amounting, according to Waterhouse's statement, to $30,000. Waterhouse was insisting on a settlement with the North Alaska S. S. Company and a clearing off of the indebtedness incurred. (Comp. Exhibit 9, Record, p 316.)

When Waterhouse reached New York he and W. F. King, who was the financial backer and controlling factor in the North Alaska S. S. Co. (Rowe's testimony, Record p. 111), formulated and put into execution a plan to obtain the steamer for themselves, in utter disregard of the trust agreement in favor of Gen. Dodge, and without paying or in any way providing for the payment of his claims. In this connection it must be borne in mind that Waterhouse was the controlling influence in Waterhouse & Co.—he was the company—and King was in absolute control of the North Alaska S. S. Co.

The indebtedness of $30,000.00 Waterhouse insisted must be provided for. Why were these debts any more sacred than the debt due Gen. Dodge? We think the evidence clearly answers this question. A portion of them were debts which were, or might become liens against the ship herself. Another portion, and no inconsiderable

portion, were the commissions which Waterhouse claimed were due to himself or his company. Of the others, Waterhouse evidently feared an effort to hold him liable for on his return to Seattle. Waterhouse showed no vouchers for any of this indebtedness—simply a telegram from his treasurer in Seattle (Record, p. 189). In fact, it is clearly proven that some of the $30,000.00 Waterhouse received was used to pay bills incurred after the ship was conveyed to the Merchants & Miners Company (see Comp. Exhibits 15 and 17, Record, pp. 181, 186, 324, 326; Record, pp. 181, 186.)

To provide for these claims, King agreed to advance $30,000.00, and Waterhouse and King, and the latter's associates, were to form a new company—the Merchants & Miners S. S. Co. stocked for $100,000 and the stock divided equally between them,—to which the steamer was to be sold for its entire capital stock; the new company giving its note to Waterhouse for $37,671.46, and to King for $30,000.00, both secured by a mortgage on the steamer (Record, p. 160).

Waterhouse & Co. and the North Alaska S. S. Co. then exchanged releases, releasing each other from all claims whatsoever (Deft's. Exhibit, Q. 3), and Waterhouse took possession of the steamer, with all the improvements that had been made upon her. The very day this was done, *without any notice to Gen. Dodge,* and without any attempt to protect his interest or

allow him an opportunity to protect it himself, the defendants, in utter disregard and violation of the trust agreement entered into at Seattle for their benefit and at their request, proceeded to carry out the scheme with King. The Merchants & Miners S. S. Co. was formed and capitalized for $100,000.00, and the "Garonne" transferred to it in full payment of the capital stock. Waterhouse & Co. and King then divided this stock equally between them, and the new company gave its note for $37.671.46 to Waterhouse & Co., and for $30,000.00 to King, and a mortgage on the steamer to secure them (Record, p. 160).

To further guard against any knowledge of this reaching Gen. Dodge, the Merchants & Miners S. S. Co. was incorporated from a small, obscure town, in the central part of New York State, where complainant would never be likely to hear of it. To have incorporated from New York City, and have the same published in the various commercial journals would have been too risky (Comp. Exhibit 21, Record, p. 334).

At the time of the sale of the ship to King, the defendants were not being pressed for payment of any of the bills against her (Record, p. 162), and as a matter of fact a number of the bills were not paid until some time afterwards (see Complainant's Exhibit 9), so that it is apparent that Waterhouse was not so pressed for payment that he did not have time to communicate

with Gen. Dodge or to seek for another and better purchaser for the ship than King and his friends.

That this transaction was extremely profitable to Waterhouse & Co. will admit of no doubt. It had fixed the selling price of the Garonne in February, 1904, at $85,000 (Record, p. 141). There had been expended for betterments upwards of $31,000 (Comp. Ex. 9); it had received $47,328.54, leaving a balance due of $37,671.46 on the purchase price, and it now receives a mortgage on the steamer for the balance of the purchase price, $37,671.46, and a half interest in the steamer as well, represented by $50,000 of stock in the Merchants & Miners Company; and in order to justify this unconscionable situation Waterhouse & Co. simply return the trust agreement and other papers to General Dodge with misstatements and say they are sorry they can do nothing for him. Such a situation is intolerable and will not be permitted by a court of equity.

Why was not Gen. Dodge notified of all this and given a chance to protect himself? If the appellant was selling the ship in good faith, as it claimed to be doing, what possible objection was there to Dodge knowing of it and been given an opportunity to protect his interest? Dodge had an interest in the ship to at least $10,000. His claim was junior to the claim of Waterhouse & Co. and to all *bona fide* maritime liens against the vessel. Under these circumstances he had the undoubted right

by law to pay off all claims against the ship, and take her, in the hope of realizing his claim out of her. Why was he not given this opportunity? The appellant says he could not be found in New York. It appeared from the testimony to the trial court that a ten-year-old boy of ordinary intelligence could have found him. His office was open at all reasonable times; he himself was there pretty constantly; there was telephone connection between his office and the place where these meetings were held; the distance between them would not exceed a mile; Gen. Dodge was a man of great prominence known to a large circle; a letter addressed to him in New York, without the street number, would certainly have reached him; his business address was known to Waterhouse and a number of those at the meeting to-wit, W. F. King, Baldwin, and McKee & Frost, attorneys, were personally acquainted with him (Pusey's testimony, Rec., p. 479). All this testimony was entirely uncontradicted. The only conceivable reason why he was not notified was that he was not wanted at the meetings, and it was not intended that his interests should in any way be protected.

The appellant was entitled to an opportunity to protect his equity in the steamer to the extent of the payment of all claims against her, holding the steamer as security. Had Waterhouse & Co. carried out the trust agreement in good faith as it promised and was bound to do, Gen. Dodge would have had this opportunity. That

No. 1490

IN THE

United States Circuit Court of Appeals

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Appellant,

vs.

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Appellees.

In Equity

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Reply Brief for Appellant

W. H. BOGLE,
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I.

It is obvious that any decree rendered in this case in favor of the appellee involves primarily an adjudication by the court that the North Alaska Steamship Company is indebted to the appellee in the amount so ascertained and decreed by the court. It seems fundamental that no such adjudication can be had in the absence of that company. Mr. Pusey in his testimony admits that the indebtedness of the North Alaska Steamship Company to the appellee was considerably less than $10,000, and says that Smith consented to add some $1,500 to the claim, making

it up to $10,000, in order to cover the expenses that complainant had been put to in endeavoring to secure his claim, including traveling expenses and attorney's fee of Pusey (Record, pp. 482, 504). The North Alaska Steamship Company is not shown to have either authorized Smith as its president to enter into such an agreement with Pusey, nor to have ratified his action after it was done. Whether the note executed by Smith to Waterhouse & Company, as trustee for Dodge, for $10,000 was a corporate act, and binding on the North Alaska Steamship Company, is a question which must primarily be settled between that company and the appellee.

In *Saloy vs. Bloch,* 136 U. S. 338, the facts were as follows: Saloy, under the laws of Louisiana, had a landlord's lien on the agricultural crops grown by his tenants, the Dragons, for the agreed rental. Bloch was a merchant advancing supplies to the Dragons. Saloy waived in writing his lien upon these crops in favor of Bloch to the extent of any supplies that Bloch might make to the tenants, and the tenants thereupon gave Bloch a lien upon the crops for supplies. Notwithstanding this waiver by Saloy, he appropriated the tenants' crops and converted them to his own use. Bloch brought suit against Saloy to recover the amount of his supplies on the above statement of facts. The court in disposing of the case said:

"But his claim against Saloy is an equitable one, and in the United States court can only be pursued on the equity side on a bill for an account * * * * * * ;

and in such suit an inquiry would be had as to the amount of Bloch's claim against the Dragons, and they would be necessary parties. The debt for which the plaintiff sues Saloy is their debt, and yet they are not cited and no judgment has been obtained against them."

In *Swan Land & Cattle Company vs. Frank,* the corporation had distributed its corporate funds among its stockholders and ceased or suspended business. A creditor of the corporation brought suit against some of the stockholders to reach and subject the corporate assets so received by them to the payment and satisfaction of his claim. The Supreme Court held that the corporation was an indispensable party, saying:

"The complainant's right to follow the corporate funds in the hands of the defendants depends upon its having a valid claim for damages against the vendor corporation. That demand is not only legal in character, but can be settled and determined by some appropriate proceeding to which the corporations against which it is made are parties and have an opportunity to be heard. Stockholders cannot be required to represent their corporations in litigation involving such questions and issues. The corporations themselves are indispensable parties to a deal which affects corporate rights or liabilities. Thus in *Deerfield vs. Nins,* 110 Mass. 115, it was held that the corporation was a necessary party in a bill by a creditor of the corporation against its officers and stockholders who had divided its assets among themselves. So, in *Gaylords vs. Kelshaw,* 1 Wall. 81, it was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation."

Swan Land and Cattle Company vs. Frank, 148 U. S. 603, 610.

That case also answers the suggestion in appellant's brief to the effect that the North Alaska Steamship Company was no longer engaged in business, and therefore not a necessary party. So long as the corporation had not been dissolved, it was a necessary party to any action which sought to collect a debt owing by it. The case of *Gaylord vs. Kelshaw*, 1 Wall. 81, seems to be peculiarly in point. There the debtor, who was grantor, had by his fraudulent conveyance, divested himself of all interest in the property. The suit was an action to condemn the property for the payment of his debt; the only necessity for his presence in the case was the fact that it was his debt which the creditor was seeking to collect. The conveyance, although fraudulent as to creditors, was good between the grantor and the grantee and operated to divest all title and interest of the grantor in the property. He was held to be a necessary defendant because the court would not undertake to adjudicate the amount of his indebtedness until he was brought into the record.

In the case at bar, the court below not only adjudicated an indebtedness of the North Alaska Steamship Company, but held that company to be bound by the action of Smith in adding $1,500 to the previous indebtedness, and in executing a promissory note for the amount thus increased, and providing for payment within sixty days, and adding a clause carrying an attorney's fee in case of non-payment, and entered a judgment against the

appellant for this full amount. Even conceding that the North Alaska Steamship Company was indebted to the complainant in the sum of $8,500 balance on his loans, there is no corporate action which obligates that company in any way for the traveling expenses or attorney's fees of Mr. Pusey, which were lumped at $1,500 by him and Smith, and no action of that company which authorized Smith to execute the company's note for the amount thus increased, changing the terms of payment theretofore existing between complainant and the company, and adding the penalty of attorney's fee in case of default. It seems clear that that company must be brought into the record as a party to the proceeding before the court can adjudicate that the company really owed this $10,000 to the complainant, or was bound by the terms of the promissory note signed by Smith for the company.

We think the same result is reached from another point of view. Waterhouse & Company had never parted with the title to the vessel. The Steamship Company had a right to acquire the title to the vessel only on condition that it complied with the terms of the contract of purchase. Now, when it failed to comply with those terms, after receiving formal written notice from Waterhouse in New York that the contract would be cancelled and its rights thereunder forfeited unless it did so comply, and Waterhouse & Company did declare a forfeiture of the contract, any equity of the Steamship Company in the

vessel was thereby extinguished. If the Steamship Company had by any act on its part created a lien upon the property of Waterhouse during the time it had this right of purchase, and Waterhouse was thereafter compelled to pay the debt so incurred in order to clear up the lien on his own property, he would manifestly have a right of action over against the steamship company to recover from it the amount so paid. The steamship company was a necessary party to this proceeding therefore in order that it might be heard upon the question whether any act of that company had created a lien upon the vessel, and, second, that it might be heard upon the question of the amount of the indebtedness so incurred by it, and for which Waterhouse would have a right of action over against it.

It is claimed by the appellee that the release and receipts exchanged between Waterhouse & Company and the North Alaska Steamship Company had the effect of releasing the steamship company from any such contingent liability. We think that no such effect can be given to the release. It is clearly shown by the testimony that the receipts and release exchanged between Waterhouse & Company and the North Alaska Steamship Company related to the obligations or liabilities then asserted each against the other. Waterhouse released the steamship company from its obligation to pay the balance of the purchase money on the steamer. The steamship company released him from any obligation to return

any of the payments previously received by him from that company. They were dealing with existing liabilities. While it is true that a receipt or release is a written document, it is to be construed in the light of the facts as they existed at the time it was executed. A release given in July, 1904, will not be construed as a release of an obligation of Waterhouse & Company against the North Alaska Steamship Company which did not come into existence until the entering of a decree in this case and the payment thereof by Waterhouse.

It has been argued by appellee in his brief that the Dodge debt was one of the debts which Waterhouse & Company agreed to pay, and which was represented by the $30,000 outstanding against the vessel. This is such a manifest misrepresentation of the testimony that it does not seem to call for any special reply. The testimony with respect to the execution of these receipts is found on page 279 of the record, and is as follows:

"After the receipt of this notification from Mr. McKee, I took the matter up with him, and after some considerable discussion, he agreed that he would recommend to his company not to assert any claim for return of the moneys that they had paid, nor to engage in any litigation about it, provided full receipts were exchanged between Frank Waterhouse & Company and the North Alaska Steamship Company, so that Waterhouse could not assert any further claim against the company and the company could not assert any further claim against Frank Waterhouse & Company. He afterward and during the same day furnished me with a copy of the resolution of the board of directors under date of July 9th,

a copy of which is filed with Mr. Waterhouse's deposition and marked as defendant's Exhibit "J-3." Thereupon receipts in full were passed between Frank Waterhouse & Company and the North Alaska Steamship Company each releasing the other from any further claims. I should have stated that in this arrangement with Mr. McKee it was stipulated that Frank Waterhouse & Company should not assert any claims to the freights that were payable in Nome on the cargo carried up on the "Garonne," this being the freights that had been transferred by Mr. Smith to Mr. Pusey."

Also "During the time of these negotiations at New York Mr. Waterhouse requested his office in Seattle to wire him what amount of outstanding bills against the North Alaska Steamship Company for material, supplies, labor, etc., had been up to that date turned into the office, and which remained unpaid. He received a telegram from his office under date of July 7th furnishing that information, and which is complainant's Exhibit No. 11 in this case." (Transcript 280-81.)

These dealings had nothing to do with the Dodge claim, and the lien debts there referred to were debts for material, supplies and labor incurred by the North Alaska Steamship Company on the vessel, and which would be maritime liens.

We most respectfully insist that the North Alaska Steamship Company was an indispensable party to this proceeding.

II.

We insist that the complainant never at any time had any lien upon the ship "Garonne." The appellee places his entire contention upon the trust agreement entered into between Waterhouse & Company and Dodge's agent on June 2, 1904, and invokes the doctrine that equity considers that done which ought to have been done. His position is thus stated on page 40 of the brief:

"It is a well established maxim of equity that equity considers that done which ought to have been done, and although this mortgage was not in fact finally executed by the officers of the North Alaska Steamship Company, other than Smith, it was nevertheless a mortgage to all intents and purposes. In other words, it is an equitable mortgage."

The fallacy in the whole argument consists in the fact that this trust agreement was entered into between Waterhouse & Company, a creditor, and Dodge, a creditor; the North Alaska Steamship Company, the debtor, was not a party to it and refused to sanction it. That two creditors cannot create an equitable mortgage upon the assets of a debtor, without the debtor's consent, is too plain for argument. Even if Waterhouse & Company had specifically agreed with Dodge to hold the legal title to this vessel as security for Dodge's debt, the agreement would not have constituted even an equitable mortgage or lien without the assent of the debtor. As a matter of fact, as is plainly expressed in the face of the trust agreement, Waterhouse did not agree to hold the legal

title he then had as security for Dodge's debt, but agreed to take a mortgage from the debtor, the North Alaska Steamship Company, securing both his own and Dodge's debt. This undertaking on the part of Waterhouse was not consummated, however, because the North Alaska Steamship Company refused to execute the mortgage. Appellee's counsel have searched this record in vain in the attempt to find any act upon the part of the North Alaska Steamship Company which can be construed as creating a lien upon this vessel in favor of Dodge. There is some testimony on the part of Mr. Pusey to the effect that at the time the debt was created there had been some agreement on the part of the company to give Dodge a mortgage as soon as the company should acquire title to the vessel. The facts with respect to that agreement have not been developed for the reason that the complainant did not plead any such agreement, and it was therefore immaterial. The rights set up in the complaint and the rights asserted by appellee in his brief are based entirely upon the arrangement made on the 2nd of June, 1904. Unless some act or agreement upon the part of the North Alaska Steamship Company can be cited which act or agreement constituted a mortgage or lien upon this vessel, in favor of Dodge, then we respectfully submit that this action cannot be maintained.

But even if the North Alaska Steamship Company had been a party to this trust agreement and had spe-

cifically agreed to execute the mortgage, we think it would not change the result in this case. As we have pointed out in our original brief, there was an indebtedness of something like $30,000 for labor, material and supplies which were maritime liens upon the vessel and paramount to even the claim of Waterhouse & Company. It is true Waterhouse & Company were not personally liable therefor, but the vessel was liable. It is shown beyond cavil by the testimony that Smith agreed that these debts should be paid promptly by his company, so that the mortgage would be a first lien upon the vessel. This is shown by the testimony introduced on behalf of the defendants below, and by the letter written by Waterhouse & Company to the Occidental Securities Company at the time the documents were forwarded to the Chase National Bank (Transcript, pp. 219, 265), and is not disputed by Mr. Pusey or any other witness on behalf of the complainant. Mr. Pusey's testimony with respect to these outstanding claims is neither full nor frank. His testimony (p. 50 Transcript) taken after the testimony on behalf of the defendants was taken, seems to convey the impression that nothing special was said with respect to any outstanding bills, and that he did not understand that there were any outstanding bills "in excess of freight and passenger money." He knew, however, that approximately $18,000 of the receipts from the freight and passenger money had been paid over to Waterhouse and cred-

ited on the purchase money on the vessel, thereby reducing the balance from something over $55,000 to $37,641; and as it is an admitted fact, that there were large outstanding unpaid bills, which would be liens ahead of the mortgage contemplated at that time, and as Pusey and Smith were intimate friends of long standing, it is incredible that Smith concealed from him the fact of the existence of these outstanding claims. In fact, his own testimony shows that he did know there were outstanding claims, and he could very truthfully say that he did not know they were in excess of the freight and passenger receipts; but he was careful not to say that he did not know they were in excess of the freight and passenger receipts after the $18,000 of these receipts had been applied to the purchase price of the vessel. It is shown by the testimony for the defendants that at the time Smith and Pusey were in conference with Waterhouse, the only information then obtainable was that these outstanding bills would aggregate between $13,000 and $15,000.

Pusey does say that no one stated in his presence that Smith or his New York company or associates would advance money to pay off these supply and repair bills. In this statement his testimony is in conflict with that of the other two witnesses for the defendant who were present at that conference. Smith, who was the particular friend of the complainant, has not been examined in the case. It is reasonable to suppose that on account of the

relations existing between him and the complainant, and their residence in New York City, that his testimony would have been taken by complainant if it would have supported Pusey's testimony on this point. The testimony of the defendant's witnesses upon this proposition is also corroborated by the letter written at the same time to the Occidental Securities Company, and by the inherent probabilities. Waterhouse had a contract under which he had a right to declare a forfeiture against the purchaser; the purchaser had deliberately breached that contract by incurring these outstanding bills against the ship. The record shows that Waterhouse had for months persistently demanded the payment of these bills by the North Alaska Steamship Company, and up to as late as May 26th, less than a week before this conference, had threatened to cancel the contract unless these outstanding bills were paid. It is scarcely credible, therefore, that he would suddenly change his whole position, waive his contract and his rights under it and agree to accept a mortgage upon the vessel with prior liens existing thereon for very large sums which nobody agreed to pay off. We think, therefore, we are within the record in saying that one of the essential conditions of Waterhouse's consent to waive his contract and accept the mortgage was that these debts should be paid off by the North Alaska Steamship Company promptly so that his mortgage would be a first lien on the vessel. This, as we have stated, was

never done. Therefore we say that even if the North Alaska Steamship Company had on June 2nd approved Smith's verbal agreement to execute a mortgage, the equitable rule converting that agreement into an equitable mortgage would not be applicable for the reason that the condition upon which Waterhouse & Company agreed to waive their contract and accept a mortgage, to-wit, the payment of the outstanding maritime lien debts, was not complied with. To compel them to waive their contract rights and accept the mortgage subject to these maritime liens, would be inequitable and unjust, and would be the making of a contract by the court which Waterhouse & Company had refused to make.

The appellee in his brief charges King and Waterhouse with combination and conspiracy to defraud the appellee. He refers to Mead as a man sent out by King to investigate the status of the North Alaska Steamship Company (Transcript, p. 7).

The appellant of course has no personal knowledge of the internal workings of the North Alaska Steamship Company in New York. The record shows that from June 2nd until June 16th. he was continually wiring insisting upon the payment of the material debts and the execution of the mortgage, and was then informed by wire from Leake, the secretary, and Rowe, the vice-president, that no money would be paid until after Mr. Mead's arrival and the examination of the accounts, and that

Mead was being sent out by the company for that purpose. Up to that time the appellant had no knowledge or information leading him to suspect dissensions and quarrels within the steamship company. The agreement between Waterhouse and King entered into on July 9th was made after Waterhouse had exhausted all efforts to get the North Alaska Steamship Company to either pay off the outstanding bills and take title and execute the mortgage, or to pay the appellant all the purchase money due him; and after the steamship company had publicly announced its inability to complete the contract, and had renounced any interest in the ship. Waterhouse then took up the matter with King for the first time, for the plain business reason that he was confronted with about $30,000 lien debts which were current bills due and payable, and which, in order to maintain his financial credit and the credit of the ship, he was compelled to immediately provide for. The idea of Dodge having a lien upon the ship never entered the minds of any of the parties to the transaction. The fact that the agreement with King was made on the same date that the steamship company abandoned its contract, simply shows that Waterhouse immediately sought relief against the outstanding bills which had been thrown upon him. The testimony of all the parties present at the transaction, and who were cognizant of the deal with King, is explicit to the point that the matter of such a contract was never hinted at

between Waterhouse and King until after the North Alaska Steamship Company had passed out of the transaction.

The appellee in the brief has stated and reiterated the ability and willingness of Dodge to have protected his debt by paying off the prior liens against the ship if he had been notified of the situation. This may or may not be true. The testimony shows that Waterhouse spent some nine days in New York endeavoring to secure payment of his own debt, or payment of the outstanding lien debts, and that he went so far as to offer to extend his own debt for six, twelve and eighteen months if the prior lien debts were paid off, and he was given a first mortgage on the ship. That being his position, it is manifest that instead of having any object in keeping Dodge in ignorance of these transactions, it was to his interest that Dodge should be notified, particularly if he had any reason to suppose that Dodge would be willing to pay off these prior debts in order to protect his own debt. This circumstance alone, aside from the other testimony, should be sufficient to show that Waterhouse was at least acting in good faith.

The testimony of Pusey shows that he was notified of the transactions taking place in New York as soon as his return to that city, and on or about the 24th or 25th of July, and he immediately thereafter conveyed the information to Dodge. At that time the "Garonne" had not

been conveyed to the Merchants & Miners Steamship Company. If Dodge was both able and willing to have taken care of these prior liens in order to protect his own debt, he could very easily have done so at that time, but he manifested no such purpose or intention. On July 27, 1904, Mr. Pusey wrote to Waterhouse stating that he had heard through Mr. King that the "Garonne" had been disposed of to a new company, but he indicated no desire to pay off the prior liens and take over the vessel even at that time, nor did he assert any lien on the vessel for this debt (see Transcript, p. 547). These facts are such as to raise a strong suspicion at least that the complainant never at any time contemplated advancing any money to pay off the liens on this ship in order to protect his claim.

The prayer of the complaint in this case is for an accounting of the money and property received by Waterhouse & Company by reason of the sale of the "Garonne," and of the value of any and all property so received, and that they be decreed to pay complainant whatever shall thereupon be found due him from the defendant, or in the alternative that the terms of the trust agreement be impressed upon said proceeds, and that the court proceed to administer the trust for the protection of the complainant (Transcript, p. 13). The testimony shows that no money whatever was ever received by the defendant from the sale of the "Garonne." The transfer to the Merchants & Miners Steamship Company was

made in consideration of stock in that company and the assumption by that company of the $67,000. The stock represented nothing, as there was no stock subscription, and the company had no assets except the ship, and the arrangement for the issuance of stock was simply to give the two parties interested an equal voice in the management of the company. No money was earned by the operation of the vessel by the Merchants & Miners Steamship Company, and when that company subsequently sold the vessel to the White Star Steamship Company it received $90,000 par value of the stock of that company in payment. There has been no attempt to show the value of that stock nor to impress any trust upon that stock in favor of the complainant. Instead the court below found that the vessel was in fact worth more than the outstanding bills and Waterhouse's debt and the complainant's debt, and therefore entered a written judgment against the defendant. This was not in accordance with the prayer of the complaint, and we respectfully submit is not according to the equities of the case, even assuming that complainant is entitled to recover. Any statement of the value of the vessel is more or less a guess. The vessel was sold on October 15, 1905, for $37,500 (Transcript, p. 233). There is no reason to assume that the Merchants & Miners Steamship Company did not sell the vessel for the best price obtainable. If the complainant was entitled to recover at all, the decree should follow the prayer by directing that an accounting be had of the property re-

ceived by the defendants from the sale of the vessel, or from its operation, and of all of the outstanding maritime liens against the vessel which the defendant had had to pay, or which have since been established, from this accounting determine whether there was a surplus applicable to the complainant's debt. The testimony shows not only the payment of the $30,000 of lien debts, but it shows the existence at the time the testimony was taken of other claims arising under the North Alaska Steamship Company's management, which were then pending and undetermined;—one of these claims, to-wit, that of C. J. Jorgenson, is now pending in this court upon an appeal by the Merchants & Miners Steamship Company from a judgment against the ship for something over $3,600. The existence of that claim was shown in the testimony in this case. Of course if that is a lien against the vessel, it was a lien paramount and prior to the claim of the complainant in this case, even assuming that complainant had an equitable mortgage upon the vessel, and is an item that would properly be taken into account in an accounting by Waterhouse & Company, as trustees.

Upon any view that can be taken, we think that this case should be reversed.

Respectfully submitted,

W. H. BOGLE,

CHAS. P. SPOONER,

Proctors for Appellant.

No. 1496

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F., CAL.

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INDEX.

In the Circuit Court of the United States, Ninth Circuit, Within and for the District of Montana.

GREAT FALLS NATIONAL BANK (a Corporation),

Complainant,

vs.

CHARLES D. McLURE, DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana,

Defendants.

Stipulation of Counsel Under Rule 23.

It is hereby stipulated by and between the appellant and appellees that in the printing of the record the clerk of the Court may omit therefrom the inventory of loose personal property which is a part of Exhibit "AA," attached to the bill of complaint, leaving the printed record to consist of the following papers, to wit: Bill of complaint (with that portion omitted as above mentioned), the demurrer of the defendants, petition for allowance of appeal and order granting same, assignment of errors and prayer for reversal, bond on appeal, citation on appeal and certificate of Clerk. After bill of complaint title of

court and cause may be omitted, and in lieu thereof insert "Title of Court and Cause."

A. C. GORMLEY,
Solicitor and Counsel for Appellant.
IRA T. WIGHT,
Solicitor and Counsel for Appellees.

To the Clerk of the United States Court of Appeals for the Ninth Circuit.

You will please print the record in the case above-entitled pursuant to the foregoing stipulation.

A. C. GORMLEY,
Solicitor and Counsel for Appellant.

[Endorsed]: No. 815. United States Circuit Court, Ninth Circuit, District of Montana. Great Falls National Bank, Complainant, v. Charles D. McLure, et al., Defendants. Stipulation Under Rule 23. Filed and Entered Aug. 23, 1907. Geo. W. Proule, Clerk. A. C. Gormley, Attorney for Complt.

No. 1496. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1907. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 815—IN EQUITY.

GERAT FALLS NATIONAL BANK (a Corporation),

Complainant,

v.

CHARLES D. McLURE et al.,

Defendants.

. . **Caption.**

Be it remembered, that on the 25th day of February, A. D. 1907, the complainant filed its bill of complaint herein, which said bill of complaint is entered of final record herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, Within and for the District of Montana.

GREAT FALLS NATIONAL BANK (a Corporation),

Complainant,

v.

CHARLES D. McLURE, DIAMOND R MINING COMPANY (a Corporation), and A. W. Merrifield, United States Marshal for the District of Montana,

Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the District of Montana, in Equity Sitting:

Comes now the complainant above named, Great Falls National Bank, a corporation, and brings this, its bill of complaint, against the above-named defendants, Charles D. McLure, a citizen of the State of Missouri, the Diamond R Mining Company, a corporation, and A. W. Merrifield, United States Marshal for the District of Montana, whereupon your orator complains and says:

1. That the complainant, the Great Falls National Bank, is a corporation duly organized and existing under and by virtue of the national banking laws of the United States, and doing business as such in the city of Great Falls, county of Cascade and State of Montana.

2. That the defendant, Diamond R Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, and holding and owning certain property in the county of Cascade and State of Montana.

3. That the defendant, A. W. Merrifield, is the duly appointed, qualified and acting United States Marshal in and for the District of Montana, and that as such officer, under and by virtue of the writ of

execution issued out of this court in the action of Charles D. McLure vs. Diamond R Mining Company, defendant, and hereinafter referred to, he has advertised the property hereinafter described for sale at Neihart, Cascade County, Montana, on the 26th day of February, 1907, and is threatening to sell said property at said time and place.

4. That on the 14th day of December, 1901, the defendant, Charles D. McLure, then and at all times a nonresident of the State of Montana, and residing in the city of St. Louis, in the State of Missouri, instituted an action in this court in the city of Helena, County of Lewis and Clark, and State of Montana, as plaintiff against the above-named Diamond R Mining Company, as defendant, and on said date there was issued out of said court a writ of attachment in said cause, directed and delivered to the United States Marshal for the District of Montana for service; that in pursuance of said writ of attachment said United States Marshal filed a notice of attachment with the County Clerk and Recorder of the county of Cascade and State of Montana, on the 16th day of December, 1901, thereby levying upon certain real estate in said Cascade County belonging to said defendant, Diamond R Mining Company, and described in said notice, and did also, in pursuance of said writ, on the 18th day of December, 1901, attach and levy upon certain personal property be-

longing to said defendant company in said county, by taking possession thereof and placing one John L. Tripp in charge thereof as keeper, said Tripp being an employee of said defendant company; for a full and complete description of the property aforesaid reference is hereby made to the list hereto attached, marked Exhibit "AA," and made a part hereof; that the invoice of loose personal property referred to in said exhibit as Exhibit "B," constitutes the machinery, tools, etc., in the concentrator building, power-house and buildings at the mine referred to in Exhibit "A" thereof; that the defendant, Diamond R Mining Company, had not then, nor has it now, any other property than the said property so attached; that summons in said action was served upon L. S. McLure, as president of the said Diamond R Mining Company, and on the 16th day of January, 1902, a judgment by default was entered in said cause in the city of Helena, Lewis and Clark County, Montana, in favor of the said Charles D. McLure, as plaintiff, and against the said Diamond R Mining Company, as defendant, for the sum of eighty-six thousand one hundred eighty dollars ($86,180.00) and fifty-three dollars and thirty cents ($53.30) costs; that the plaintiff therein, Charles D. McLure, never at any time caused or requested a writ of execution to be issued out of this court until on, to wit, the 10th day of January, 1907, two days after the fil-

ing of complainant's original petition in intervention therein, nor has he at any time directed or requested said United States Marshal, or any other officer, to do anything further in said cause since the service of said writ of attachment as aforesaid, and no further levy has been made or lien acquired since the service of said writ of attachment; that the said defendant has, by his laches and unreasonable delay, waived, abandoned and lost whatever lien he may have had or claims upon said property.

5. That on the 17th day of December, 1901, the complainant herein commenced a certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, being numbered 3876 on the records of said court, against the said Diamond R Mining Company, a corporation, as defendant, by the filing of a complaint therein; that immediately after the filing of said complaint and the issuance of a summons thereon, this complainant, as plaintiff in said action, also made and filed an affidavit of attachment in due form, as required by section 891, and also furnished and filed an undertaking on attachment in due form, with two sufficient sureties, approved by the Clerk, as required by section 892, of the Code of Civil Procedure of the State of Montana, and thereupon a writ of attachment was duly issued out of said court in said cause, and directed to the sheriff of the said

county of Cascade and State of Montana, as provided by section 893, of the Code of Civil Procedure of the State of Montana, and the same was thereupon placed in the hands of said sheriff for service, and the said sheriff did duly serve said writ on the 17th day of December, 1901, by levying upon, all and singular, the same and identical real estate and appurtenances aforesaid, including the concentrator building, power-houses and all other buildings situate upon and appurtenant to said real estate, together with all machinery and tools of every kind therein, and as particularly described in said Exhibit "AA," herein referred to, the sheriff of Cascade County making the levy as aforesaid upon said real estate by filing with the County Clerk and Recorder of said county on said date a copy of the said writ of attachment, together with a description of the said property attached, and a notice that it is attached, all as provided in section 895, of the Code of Civil Procedure of the State of Montana; and the said sheriff making his levy upon all the personal property by taking possession thereof simultaneously with the said United States Marshal, but said possession having been thereafter surrendered by reason of the interference and obstruction of the said marshal, and the said Tripp continued to hold possession of all said property; that after the due service of summons in said cause upon said defendant, a

judgment in due course was duly given, made and entered in said cause in favor of the complainant, as plaintiff, and against the said defendant, for the sum of twenty-five thousand three hundred four dollars and eighty-four cents ($25,304.84.) and thirty-seven dollars and seventy cents ($37.70) costs, which judgment was thereupon duly docketed in the office of the clerk of said court; that no part of said judgment has been paid, and the whole thereof is still a valid and subsisting indebtedness from the said defendant to the said plaintiff, the complainant herein; that the complainant has been and still is prevented from realizing the fruits of its said judgment by reason of the acts of the defendant, Charles D. McLure, herein complained of.

6. That the said judgment in favor of the complainant and against the said defendant, Diamond R Mining Company, aside from two claims assigned to the complainant, amounting to three thousand two hundred sixty-one dollars and thirty-seven cents ($3,261.37), was based upon certain promissory notes, given and executed by the defendant company on April 15th, 1900, May 10th, 1900, June 1st, 1900, and June 15th, 1900, all payable on demand, in consideration of money advanced by complainant to defendant on said respective dates; that at the time said moneys were so advanced, and during all the times herein stated, one L. S. McLure, brother of

the defendant Charles D. McLure, was the general manager and a director of the said Diamond R Mining Company, and in personal charge of its affairs, and ever since the 12th day of June, 1900, has also been the president of said company, and was also, at all the times herein stated, the agent and representative of the defendant herein, Charles D. McLure, who was residing in the city of St. Louis, State of Missouri, and said Charles D. McLure was also a director in said company until the 9th day of October, 1900; that said Charles D. McLure and L. S. McLure were, at all the times herein stated and still are, the largest stockholders of said company and owned and controlled, and still own and control, a majority of the capital stock thereof; that during said time the said Diamond R Mining Company was building and constructing a concentrator at its mine in the town of Neihart, Cascade County, Montana, and that the moneys borrowed from the complainant as aforesaid were requested by the defendant company for the purpose of meeting urgent current expenses of the said defendant in connection with said work; that the complainant refused to loan any money whatsoever to the defendant company except upon the understanding that the said Charles D. McLure would immediately repay the same in preference to any other indebtedness of the said Diamond R Mining Company and before any of said moneys were so

advanced, and a part of the consideration therefor, it was so understood and agreed that the said Charles D. McLure would repay the same to the complainant as aforesaid, and fully protect the complainant against any loss or damage as the result of said loans to the said defendant company; that some time subsequent to the advancement of said sums, aggregating twenty thousand dollars ($20,000.00), the petitioner demanded payment thereof from the said Charles D. McLure, and he promised to pay the same, but notwithstanding the aforesaid facts and circumstances, whereby the complainant was led to believe, and did believe, that it would not be obliged to bring suit by attachment or otherwise to enforce the payment of said indebtedness, the complainant knowing at all times that the said Charles D. McLure was the only other large creditor of the defendant company, the said Charles D. McLure did, nevertheless, institute the aforesaid action and, as hereinbefore set forth, levy upon and attach all the property of every kind and character belonging to the said defendant, Diamond R Mining Company; that the said attachment by the defendant herein, Charles D. McLure, as plaintiff in said cause, was not sought or made in good faith, as stated in his affidavit therefor. but was made and the said action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant and

other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court.

7. That a concentrator of one hundred (100) tons daily capacity had been completed by the defendant, Diamond R Mining Company, on or about the —— day of———, 1900, for the purpose of concentrating its ores; that said concentrator had been operated successfully and profitably in concentrating the ores on the dump of the mine of the said defendant company, and that said concentrator had been erected for the purpose of concentrating the ores that would thereafter be extracted from the defendant company's said mine, and this was so understood by the complainant when it loaned the sums of money aforesaid; that after the completion and successful operation of said one hundred ton concentrator, the said Charles D. McLure and L. S. McLure, controlling the affairs of the company as aforesaid, proceeded to enlarge said concentrator so as to make the same have a capacity of three hundred tons of ore daily, and which was done at an additional cost and expense of about one hundred thousand ($100,000.00) dollars (most of which was advanced by said Charles D. McLure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action), that the company voted to enlarge said concentrator and to borrow said money under the prom-

ise and agreement of said Charles D. McLure that he would consolidate the Broadwater Group of mines, then owned by him, with the mines of said company, but which promise and agreement he has never kept, and there has thereby been a failure of consideration for the notes sued on by said Charles D. McLure, plaintiff in said action; that the said concentrator, after successfully treating the ores on the dump of said company, as aforesaid, was thereafter used by said Charles D. McLure for his sole benefit in concentrating ores from his said Broadwater Group of mines under a contract of seventy-five (75¢) cents per ton, which was a loss to said company, instead of being used to treat the ores from the company's mine as originally intended; that notwithstanding that the said concentrator was reasonably worth the sum of one hundred seventy-five thousand ($175,000.00) dollars, if the same were to be kept in operation in pursuance of the original plan, and notwithstanding also that the mining claims and property of the defendant company were, taken in connection with the concentrator, then and there reasonably worth the sum of five hundred thousand ($500,000.00) dollars and could have been worked and operated at a profit, all of which was well known to them, the said Charles D. McLure and L. S. McLure, acting in collusion for the purpose of cheating and defrauding the complainant and other creditors,

as well as the minority stockholders of the defendant company, closed down the said concentrator and failed and refused to open up the defendant company's mine, and at once instituted the aforesaid action and levied upon and attached all of the defendant company's said property.

8. That on the 9th day of February, 1903, one George F. Bartlett recovered a judgment and decree against the said Diamond R Mining Company in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, for the sum of fifteen hundred twenty-nine dollars and ninety cents ($1529.90) and under and by virtue of said judgment, the sheriff of Cascade County, Montana, did, on the 20th day of April, 1904, sell lots numbered 1, 2, 3 and 4 in block numbered 2 in the original townsite of Neihart, Montana, as platted by Frank P. Atkinson, trustee, upon the surface of the Frisco Lode Mining Claim, the said lots embracing the parcel of ground upon which the first part of the defendant company's said concentrator was erected and the judgment aforesaid, upon which the same was sold, being by virtue of the foreclosure of a mechanic's lien upon the same; that the defendant herein Charles D. McLure and his brother L. S. McLure, acting collusively and fraudulently as aforesaid, took no steps whatsoever to redeem said property for the company or to protect the interest of

the stockholders or creditors thereof, but on the 23d day of March, 1905, the defendant herein, Charles D. McLure, redeemed the said land and premises from said sale for himself by paying to the said sheriff for the purchaser, the sum of nineteen hundred thirty dollars and twenty-five cents ($1930.25), which was then and there due, said defendant effecting said redemption as the owner of the judgment recovered in the aforesaid action in this court; that thereafter, to wit, on the 2d day of January, 1906, upon application of the said defendant, Charles D. McLure, the sheriff executed to him a deed for said land and premises; that by reason of the said foreclosure proceedings instituted by said George F. Bartlett and the sale of the said premises thereunder, and the redemption by the said defendant, Charles D. McLure, the said defendant thereby became vested with the legal title to that portion of the concentrating plant of the defendant company which had originally been constructed at a cost of $75,000.00; that under and by virtue of the provisions of section 1236 of the Code of Civil Procedure of the state of Montana, the said defendant, Charles D. McLure, plaintiff in said action, would not have permitted this complainant, or any other redemptioner, to redeem from him except by paying the amount so paid by the defendant herein as aforesaid, and also the amount of defendant's said judgment,

to wit, $86,180.00, with interest thereon from the date thereof; that this prejudice and damage to complainant has resulted because of said defendant's delay and laches in not having execution issued upon his judgment in the aforementioned action.

9. That, as complainant is informed and believes, the plaintiff in said action, Charles D. McLure, one of the defendants herein, and his brother, L. S. Mc Lure, the president and manager of the defendant company, were acting in collusion and in fraud of the rights of the complainant and other creditors of the defendant company when they created the indebtedness for enlarging the concentrator, when they closed down the defendant company's concentrator and failed and refused to open its mines, and when the aforesaid attachment suit of the defendant herein, Charles D. McLure, plaintiff in said action, was instituted and judgment by default taken after service upon said L. S. McLure, and also when they delayed for five years to take any steps whatever to sell the property held under said attachment, leaving this property during all said time in the custody of their said employee, John L. Tripp; that they also acted in collusion and with the same fraudulent purpose and design in making no reasonable effort to pay the said claim of George F. Bartlett and in permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said

property in the manner aforesaid, to the great damage, loss and injury of this complainant and other creditors as well as the minority stockholders of the defendant company; that by reason of all the acts aforesaid, the said attachment lien and also the judgment in said cause should be held fraudulent and void as to this complainant.

10. That, as hereinbefore set forth, the property attached in said cause consists of the defendant company's mines, and also the flumes, pipes, cars, blacksmith-shop, concentrating mill and other machinery and tools used in working the same; that the value of the same, owing to its peculiar nature, is dependent upon its being kept together and used and operated as one plant; that while the said property and the different portions thereof had the values hereinbefore mentioned at the time of said defendant's said attachment on the 16th day of December, 1901, yet owing to the fact now that the said defendant has, in the manner hereinbefore set forth, acquired the legal title to a portion of the concentrating plant, the remaining portion thereof has necessarily depreciated in value in a sum far greater than the value of the portion thus segregated; that since said attachment, said defendant, Charles D. McLure, by keeping said John L. Tripp in the possession and control of said property, both real and personal, under said attachment, has deprived the said Diamond R Min-

ing Company and its stockholders of the possession, use and enjoyment of all said property and its mines have suffered great and irreparable damage and injury by disuse and neglect during said period of time; that there has also been a natural depreciation in value of the portion of the concentrating plant remaining, and all the machinery and tools connected therewith, since said attachment; that the defendant company is insolvent and that all said attached property is not now of sufficient value to more than satisfy defendant's said judgment; that the excessive attachment made in said action, and especially when taken in connection with the property acquired by defendant, Charles D. McLure, by virtue of his redemption, as a judgment creditor, should and does, in fact, amount to a satisfaction of his said judgment therein; that in any event, even though a valid lien were obtained in the first instance by said defendant under his said attachment, and even though the judgment of said defendant should not be deemed satisfied by reason of his acts as aforesaid, nevertheless the said defendant, Charles D. McLure has been guilty of such unreasonable delay and laches in failing to have a levy and sale made under execution upon said judgment, as to constitute a waiver and abandonment of his said pretended lien, and that the same should in equity be postponed and subordinated to the attachment lien of the complainant as hereinbefore set forth.

11. That the complainant, with leave of court, filed its petition in intervention in the aforementioned cause on the 8th day of January, 1907; that, thereafter, to wit, on the 10th day of January, 1907, the plaintiff in said action, Charles D. McLure, one of the defendants herein, caused a writ of execution to be issued out of this court upon his said judgment, including also $———, costs, claimed as keeper's charges, but nothing has been done thereunder; that on the 12th day of January, 1907, complainant caused a writ of execution to be issued out of the State Court upon its said judgment, and delivered same to the sheriff of Cascade County for service; that in pursuance thereof, said sheriff levied upon all the personal property of the defendant by delivering a copy of said writ of execution, together with a notice to said John L. Tripp, who was then and there in possession and control of the same, stating that all personal property in his possession and under his control belonging to the defendant company was attached in pursuance of said writ as provided by section 895 of the Code of Civil Procedure of Montana; that said sheriff is unable to proceed further with the service of said writ of execution on account of the pretended lien of the said defendant, Charles D. McLure, upon said property; that on the —— day of January, 1907, the complainant herein, with leave of court, filed in this court its

amended and supplemental petition in intervention, in the aforementioned action, setting forth the facts substantially as above, and thereafter, to wit, on the 2d day of February, 1907, on motion of the plaintiff in said cause, Charles D. McLure, one of the defendants herein, the said amended and supplemental petition was by the Court dismissed; that the complainant has no plain, speedy or adequate remedy at law, and is relievable only in a court of equity; that if a sale is had of said property under the said writ of execution issued out of this court, in the said action of Charles D. McLure, plaintiff, vs. Diamond R Mining Company, defendant, and a certificate of sale or deed is issued to the purchaser at said sale, the same will constitute a cloud upon the title to said property and the rights of the complainant thereto and will cause great and irreparable injury to the complainant and all other creditors similarly situated.

12. That on account of the attachment sought to be made by said defendant, Charles D. McLure, as plaintiff in said action, through the writ issued out of this court in said cause, and on account of the writ of execution issued out of this court on the 10th day of January, 1907, after the filing of complainant's original petition in intervention in said cause, whereby the plaintiff therein, Charles D. McLure, defendant herein, is threatening to sell all of said property, and in order to prevent any conflict between this court and the State court over the con-

troversy involved herein, the complainant comes into this court with this, its bill of complaint, and asks the permission of this court to proceed under its execution issued upon its said judgment in the State court and levy upon and sell all the property of the said defendant company, or so much thereof as may be necessary to satisfy its demand; that if the defendant, Charles D. McLure, is permitted to levy upon and sell said property under execution great and irreparable damage will be done complainant and other creditors of the defendant company.

In consideration whereof, and for as much as complainant is without full and adequate remedy in any other court and is relievable only in this court, where alone the wrong done, as well as the injury threatened, may be remedied or prevented, the complainant prays that upon consideration of this, its bill of complaint, it may please the court and your Honors to permit the complainant, or the proper officer, to take possession of and sell all the said described property of the defendant company under its execution, or so much thereof as may be necessary to satisfy complainant's judgment aforesaid; that the Court may order, adjudge and decree that complainant has a first and prior lien upon all said property, and that the attachment, or pretended attachment, made in said cause of Charles D. McLure, Plaintiff, vs. Dia-

mond R Mining Company, Defendant, hereinbefore mentioned, is null and void and of no effect, or in any event has become lost and abandoned; that the judgment entered therein is void as to this complainant, or in any event has become satisfied; that the writ of execution therein be withheld; that the defendants herein, their officers, agents and servants, be restrained and enjoined from selling or disposing of in any manner whatsoever, under the said writ of execution issued in the above-mentioned action, any of the property herein described and set forth; and for such other and further relief as to the court may seem meet and equitable.

A. C. GORMLEY,
Solicitor for Complainant.

State of Montana,
County of Cascade,—ss.

R. S. Ford, being duly sworn, deposes and says that he is the president of the Great Falls National Bank, a corporation, the complainant herein and makes this verification for and on his behalf, that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

R. S. FORD.

Subscribed and sworn to before me this 23d day of February, 1907.

[Seal] A. R. METTLER,

Notary Public, in and for Cascade County, Montana.

Due service of the foregoing bill of complaint, and receipt of a copy thereof, is hereby acknowledged at Great Falls, Cascade County, Montana, the principal place of business of the undersigned defendant in said action, this 23d day of February, 1907.

THE DIAMOND R MINING CO.

By W. P. WREN,

Secretary.

Exhibit "AA."

United States Marshal's Office,
District of Montana.

I do hereby certify that I have received the hereto annexed writ of attachment on the 14th day of December, A. D. 1901, and on the 16th day of December, A. D. 1901, at 9 o'clock A. M. executed the same by levying upon and attaching certain real estate hereinafter referred to, standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ, by filing with the County Clerk of said County of Cascade a copy of said writ, together with a notice that said property was attached, a copy of which notice is hereto attached and marked Exhibit "A," and by taking into

my custody, at two o'clock and twenty minutes P. M. of the 18th day of December, A. D. 1901, the following described personal property belonging to said defendant, and then and now situated and being in said Cascade County, to wit:

One kitchen range and cooking utensils; two kitchen tables; one refrigerator; one kitchen safe; three wardrobes; two chiffoniers; four iron bedsteads and bedding; three wood bedsteads and bedding; eighteen pillows; two lounges; one dining table; one dining side table; one dinner set dishes; table cutlery; carpets, and rugs; nine rooms; four roll-top desks; one typewriter desk; one No. 4 Smith Premier typewriter; five desk chairs; one bookkeeper's desk; one office clock; twenty-five chairs; one letter press and the further personal property described in a list thereof contained in Exhibit "B," hereto attached.

Dated this first day of January, A. D. 1902.

[Signed] J. P. WOOLMAN,
United States Marshal for the District of Montana.

Exhibit "A."

REAL PROPERTY.

One third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Carolina Quartz Lode Mining Claim, Patent No. 3253, (the Unity Quartz Lode Mining Claim, Patent No. 3253, all situated in Cascade County, Montana).

Lots, 1, 2, 3, 4, 5 and 15 of Block 2, of the Frisco Claim, Lots 1, 2, 3, 4, 5, 12, 13, 14, and 15, Block No. 3, of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36, of Block No. 6, of the Frisco claim.

Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for Concentrator site.

Two water rights on Belt Creek.

The tramway and rights of way for the same, between Moulton mine and Concentrator building.

The water flume and rights of way for same.

The Quartz Location, known as Belt No. 2. Concentrator building, power-house, and buildings at mine, and all machinery in all of the buildings aforesaid, including, engines, hoists etc. etc.

Office and household furniture, supplies, and monies and credits on hand.

Exhibit "B."

INVOICE OF LOOSE PROPERTY OF THE DIAMOND "R" MINING COMPANY. INVENTORY TAKEN DECEMBER 28th,

[Here follows invoice, the printing of which is omitted by stipulation of counsel.]

[Endorsed]: No. 815. Title of Court and Cause. Complaint. Filed and Entered Feb. 25, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 1st day of April, 1907, demurrer was filed herein, which said demurrer is entered of final record as follows, to wit:

[Title of Court and Cause.]

Demurrer of Charles D. McLure.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and to the whole thereof, and for cause of demurrer shows:

1st. That enough does not appear upon the face of the bill to show the Court's jurisdiction of the suit.

2d. That said plaintiff has not shown by its said bill that it has any right or interest in the said properties therein described which would entitle it to the relief thereby prayed.

3d. That the facts and circumstances stated in said bill do not amount to a fraud.

4th. That the bill does not set out distinctly the particulars of the fraud alleged nor the manner in which the Court or the plaintiff herein was misled or imposed upon.

5th. That it appears upon the face of said bill that plaintiff has been guilty of laches and is not entitled to the relief prayed or to any relief in the premises.

6th. That said plaintiff has not in or by the said bill made or stated such cause as doth or ought to entitled it to any such recovery or relief as is thereby sought or prayed for from and against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and the whole thereof, and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and disbursements in this behalf most wrongfully sustained.

WIGHT & THOMPSON,
Solicitors for said Defendant.

State of Missouri,
City of St. Louis,—ss.

Charles D. McLure makes solemn oath and says, that he is the above-named defendant and that the foregoing demurrer is not imposed for delay and that the same is true in point of fact.

CHARLES D. McLURE,

Subscribed and sworn to before me this 22d day of March, A. D. 1907.

My term expires March 17, 1908.

[Seal] JESSE B. MELLOR.

Notary Public in and for the City of St. Louis, State of Missouri.

CERTIFICATE OF COUNSEL.

I do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

IRA T. WIGHT,

Of Counsel for said Defendant.

[Endorsed]: Title of Court and Cause. Demurrer. Filed and Entered April 1, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 5th day of August, 1907, an order sustaining demurrer was made and entered herein as follows, to wit: [Here follows Order, the printing of which is omitted by stipulation of counsel.]

And thereafter, to wit, on the 6th day of August, 1907, a final decree was duly made and entered herein, which said decree is entered of final record herein as follows, to wit:

[Title of Court and Cause.]

Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That the complainant's bill of complaint be, and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that defendant Charles D. McLure recover from complainant his costs in this behalf expended, assessed at the sum of $20.65.

Done in open court this 6th day of August, 1907.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered Aug. 6th, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

[The following order was omitted from the printed record pursuant to stipulation of counsel, but was afterwards printed at the request of Mr. Gormley.]

And thereafter, to wit, on the 7th day of August, 1907, an order allowing amendment to bill of complaint and order as to ruling on demurrer and as to decree was duly made and entered herein, as follows, to wit:

[Title of Court and Cause.]

Order Relative to Amendment to Complaint, Demurrer and Decree.

Now comes complainant and prays leave to amend its bill by inserting therein a paragraph No. 13, which amendment was by the Court allowed. Thereupon, by stipulation, it was agreed that the demurrer heretofore submitted to the Court should be deemed applicable to the complaint as amended.

Whereupon, the Court ordered that the decree heretofore entered stand as the decree in the case under the amended pleadings.

Entered August 7th, A. D. 1907.

GEORGE W. SPROULE,
Clerk.

Attest a true copy of minute entry.

[Seal] GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk.

And thereafter, on August 7, 1907, the amendment to bill of complaint was filed, being as follows, to wit:

Amendment to Bill of Complaint.

13. That complainant's reasons for not commencing this action at an earlier date are as follows: The defendant C. D. McLure for a period of time beginning in the month of March, 1902, and ending in the month of April, 1906, made payments to the State Bank of Neihart aggregating several thousand dollars upon a loan of money made by said bank prior to the attachment suits hereinbefore mentioned, under the same circumstances and conditions, and for the same purpose as the loan made by the complainant and hereinbefore set forth; that said McLure also, in the year 1905, paid several small claims against the Diamond R Mining Company; that complainant was informed of the facts with reference to the payment of said money to said State Bank of Neihart by said McLure, and also the payment by him of the other claims aforesaid, and by reason thereof, when taken in connection with said McLure's promise to pay complainant the money due it, complainant was led to believe that said McLure would pay said debt, and waited for him to do so; that during said year 1905 parties representing the

said McLure came to complainant and made statements conveying the impression that there would be an adjustment of the affairs of said company, including complainant's said debt; that said McLure was without the State of Montana during all the times mentioned and complainant therefore waited for said McLure to come to Montana, to pay its said debt, as he had agreed, and also as the controlling stockholder of said Diamond R. Mining Company, to call a meeting of the stockholders to see what might be done to protect their interests; that said McLure did not come to Montana until the latter part of the pear 1905, and did not come at all to Great Falls, the office of said company, or undertake in any way to adjust the affairs of said company, or complainant's said debt; that complainant desired and endeavored to give said McLure as well as said company, reasonable time and opportunity to adjust said indebtedness before instituting further proceedings, knowing at all times that complainant's delay was in no manner prejudicial to said McLure or said company, and complainant here alleges that no changes have taken place or circumstances arise that would make it inequitable to recognize at this time the rights of complainant as herein set forth, or that would prevent said parties meeting the issues raised as fully as though said action had been commenced at an earlier date.

[Endorsed]: Filed Aug. 7, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, 1907, complainant filed its petition for allowance of appeal herein, which said petition is in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Allowance of Appeal and Order Allowing Appeal, etc.

Great Falls National Bank, the above-named complainant, conceiving itself aggrieved by the order of August 5th, 1907, sustaining demurrer, and decree made and entered in the above-entitled cause on the 6th day of August, 1907, whereby, among other things, it was ordered that the defendant's demurrer to the bill of complaint herein be sustained, and it was further ordered, adjudged and decreed that said bill of complaint be and was thereby finally dismissed, does hereby petition for an order allowing it, the said complainant, to prosecute an appeal from said order of August 5th, 1907, sustaining demurrer to bill of complaint, and decree so made and entered on the 6th day of August, 1907, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set

out in the assignment of errors herewith filed herein, and does hereby appeal from said final order and decree, and it prays that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order and decree was made, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit, and also that an order may be made fixing the amount of security which the said complainant shall give upon such appeal.

GREAT FALLS NATIONAL BANK,
Complainant and Appellant,
By A. C. GORMLEY,
Its Solicitor.

Order.

The foregoing petition is granted, and the appeal prayed for allowed upon said petition giving a bond in the sum of three hundred dollars. It is ordered that a certified transcript of the record, proceedings and papers upon which the final order and decree of August 6, 1907, was rendered, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM H. HUNT,
Judge.

Done in open court this 7th day of August, 1907.

[Endorsed]: Title of Court and Cause. Petition and Order. Filed Aug. 7, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1907, the complainant filed its assignment of errors herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Assignment of Errors.

Now comes the Great Falls National Bank, complainant, in the above-entitled cause, by its solicitor, and says that in the order of August 5th, 1907, and decree in said cause, entered on the 6th day of August, 1907, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors, committed or happening in said cause, and upon which it will rely on its appeal from said order and decree:

1. The Court erred in its order of August 5th, 1907, in sustaining defendants' demurrer to complainant's bill of complaint in this, that the said demurrer should have been overruled.

2. The Court erred in its said decree of August 6, 1907, in finally dismissing said bill of complaint, in that (a) the said bill of complaint set forth facts showing that the attachment of the defendant, C. D. McLure, was sought and made for the purpose of hindering, delaying and defrauding the creditors of the Diamond R. Mining Company, and particularly the complainant herein, and was therefore void.

(b) The said bill of complaint further set forth facts showing that whatever lien the said C. D. McLure may have acquired by virtue of said attachment, was waived, abandoned and lost by reason of his unreasonable delay and laches in having issued out of said court a writ of execution for the sale of the property upon which he claimed an attachment lien, and the rights of the said C. D. McLure thereby became subject and subordinate to the attachment lien of the complainant herein, and (c), the said bill of complaint set forth facts showing that the complainant was entitled to the equitable relief prayed for.

Wherefore the said complainant prays that said order of Aug. 5, 1907, and decree of August 6, 1907, be reversed, set aside and held for naught, and that said Circuit Court be directed to overrule defendants' demurrer to said bill of complaint, and to hear and determine said cause.

A. C. GORMLEY,

Solicitor for Great Falls National Bank, Complainant and Appellant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Aug. 7, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of August, 1907, the complainant filed its bond on appeal herein, which said bond is in the words and figures following, to wit:

[Title of Court and Cause.]

Bond on Appeal.

Know All Men by These Presents, that we, Great Falls National Bank, a corporation, as principal, and R. S. Ford and R. P. Reckards, as sureties, of the County of Cascade, State of Montana, are held and firmly bound unto the above-named defendants jointly and severally in the sum of three hundred dollars ($300.00), to be paid to them, or any of them, for the payment of which well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated the 7th day of August, 1907.

Whereas, the said Great Falls National Bank has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final order and decree made and entered in the above-entitled cause on the 6th day of August, 1907, by the Circuit Court of the United States for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Great Falls National Bank shall prosecute its appeal to effect and answer all costs if it fail to make its said plea good, then this obligation to be void, but otherwise to remain in full force and virtue.

GREAT FALLS NATIONAL BANK,
By R. S. FORD, President.
R. S. FORD, [Seal]
R. P. RECKARDS. [Seal]

The foregoing bond is approved by me under order of Court.

GEO. W. SPROULE,
Clerk U. S. Circuit Court for the District of Montana.

State of Montana,
County of Cascade,—ss.

R. S. Ford and R. P. Reckards, being severally duly sworn, each for himself, deposes that he is one of the sureties named in the foregoing bond, and that he is worth six hundred dollars over and above his just debts and liabilities and property exempt from execution, and that he is a resident and freeholder within the State of Montana.

R. S. FORD.
R. P. RECKARDS.

Subscribed and sworn to before me this 7th day of August, 1907.

[Seal] A. R. METTLER,

Notary Public in and for Cascade County, Montana.

[Endorsed]: Title of Court and Cause. Bond on Appeal and Approval Thereof. Filed Aug. 8, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1907, a citation was duly issued herein, being in the words and figures following, to wit:

Citation (Original).

The President of the United States of America, to Charles D. McLure, Diamond R. Mining Company, a Corporation, and A. W. Merrifield, United States Marshal for the District of Montana, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 7th day of September, A. D. 1907, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, District of Montana, wherein Great Falls National Bank, a corporation, is appel-

lant, and Charles D. McLure, Diamond R. Mining Company, a corporation, and A. W. Merrifield, United States Marshal for the District of Montana, are appellees; to show cause of any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, this 7th day of August, A. D. 1907.

WILLIAM H. HUNT,
Judge.

Due service of the above and foregoing citation admitted by copy this 7th day of August, A. D. 1907.

IRA T. WIGHT,
Attorney for Appellees.

Filed Aug. 8th, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 52

pages, numbered consecutively from 1 to 52, is a true and correct transcript of the pleadings, orders, decree, opinion, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-four 85/100 dollars ($24.85/100), and have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Helena, Montana, this 27th day of August, A. D. 1907.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1496. United States Circuit Court of Appeals, for the Ninth Circuit. The Great Falls National Bank, a Corporation, Appellant, vs. Charles D. McLure, The Diamond R. Mining Company, a Corporation, and A. W. Merrifield, United States Marshal for the District of Montana, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed August 31, 1907.

F. D. MONCKTON,
Clerk.

NO. 1496

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana.

Appellees.

APPELLANT'S BRIEF.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

A. C. GORMLEY,

Counsel for Appellant.

No. 1496

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana.

Appellees.

APPELLANT'S BRIEF.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

A. C. GORMLEY,

Counsel for Appellant.

In the United States Court of Appeals for the Ninth Circuit.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING FIELD, United States Marshal for the District of Montana.

Appellees.

ABSTRACT OF THE CASE.

This is an appeal from a final order and decree sustaining the demurrer of defendants and appellees to appellant's bill of complaint and dismissing said bill. The bill of complaint is found in the record, pages 3 to 26, and, without setting forth the said bill in full, we will, simply for the purpose of showing the nature of the action, give a summary of the facts alleged therein:

On the 14th day of December, 1901, Charles D. McLure, a resident of the City of St. Louis, State of Missouri, instituted an action in the United States Circuit Court in Helena, Lewis and Clark County, Montana, against the Diamond R Mining Company, and had a writ of attachment issued, under which the United States marshal, on the 16th day of December, 1901, filed notice of attachment upon all of the real estate of the Diamond R Mining Company in Cascade County, Montana, and on the 18th day of December, 1901, levied upon all of the personal

property of said company in said county. Summons was served upon L. S. McLure, president of said company, and brother of Charles D. McLure, and on the 16th day of January, 1902, judgment by default was entered for the sum of $86,180.00 and $53.50 costs. No writ of execution was called for or anything further done until the 10th day of January, 1907, when a writ of execution was issued, this being two days after the complainant had filed a petition in intervention in said action. On December 17th, 1901, the Great Falls National Bank, appellant herein, commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the Diamond R Mining Company, and under a writ of attachment issued in said cause the sheriff of Cascade County, on the 17th day of December, 1901, levied upon all the real estate of the Diamond R Mining Company, and also on the following day levied upon all the personal property of said company, by taking possession thereof simultaneously with the said United States marshal, but thereafter surrendering such possession by reason of the interference and obstruction of said marshal. A judgment was subsequently entered in favor of said bank against said company for $25,304.84 and $37.70 costs, and docketed in the office of the clerk of said court, said judgment being still unpaid. Said judgment was based upon moneys advanced by the bank from April 15th to June 15th, 1900.

L. S. McLure, a brother of Charles D. McLure, was at all times the general manager and director of the Diamond R Mining Company, and in personal charge of its affairs, and after the 12th day of June, 1900, was also

the president of the company, and was also, during all the time, the agent and representative of Charles D. McLure. Charles D. McLure was a director until the 9th day of October, 1900, and the two McLures were at all times the largest stockholders of the company, owning and controlling a majority of the capital stock thereof.

The moneys advanced by the bank were for the purpose of meeting urgent current expenses in the building of a concentrator, and the bank refused to loan the money to the company except upon the understanding that Charles D. McLure would immediately repay the same in preference to any other indebtedness of the company, and Charles D. McLure, subsequent to the advancement of said money, promised to pay the same. The bank was thereby led to believe that it would not be obliged to bring suit, knowing at all times that Charles D. McLure was the only other large creditor of the company.

The concentrator was first constructed by the company for a capacity of one hundred tons daily, and had been operated successfully and profitably in concentrating the company's ores, for which purpose it was constructed. Thereafter, Charles D. McLure and L. S. McLure, controlling the affairs of the company, proceeded to enlarge the concentrator to a three hundred ton capacity, and at an additional expense of about $100,000.00, most of which was advanced by Charles D. McLure, and embraces the moneys upon which he recovered judgment. The company agreed to the enlargement of the concentrator and to borrow the money under Charles D. McLure's promise and agreement to consolidate the Broadwater Group of Mines then owned by him with the mines of the company, but which promise and agreement he never kept, there

being thereby a failure of consideration for the notes sued on by him. The concentrator as enlarged was used by Charles D. McLure for his sole benefit in concentrating the ores from his Broadwater Group of Mines, at a loss to the company, instead of being used to treat the ores of the company as originally intended.

Notwithstanding that the concentrator was worth $175,000.00, if kept in operation under the original plan, and notwithstanding that the mining claims and property of the company were altogether worth $500,000.00, and could have been worked and operated at a profit, all of which was well known to Charles D. and L. S. McLure, nevertheless, acting in collusion for the purpose of cheating and defrauding the bank and other creditors, they closed down the concentrator and refused to open the company's mines; then instituted said action and attached all of the company's property.

On the 9th day of February, 1903, one Bartlett foreclosed a lien and recovered judgment against the company for $1,529.90, under which a part of said concentrator was sold on the 20th of February, 1904. No steps whatever were taken by the McLures to redeem the property for the company or to protect its stockholders or creditors, but on the 23rd day of March, 1905, Charles D. McLure redeemed the property sold by paying $1,930.25, and on the 2nd day of January, 1906, he received a sheriff's deed for same.

It is alleged that in all the matters recited Charles D. McLure and L. S. McLure were acting in collusion and for the purpose of hindering, delaying, cheating and defrauding the bank and other creditors.

It is alleged that the value of the property as aforesaid

depended upon keeping it together and operating it as one plant, but that on account of the facts set forth there has been a great depreciation in its value; that since the attachment by Charles D. McLure he has kept one John L. Tripp in possession of the property under his attachment, and has deprived the company and its stockholders of the possession, use and enjoyment thereof, and its mines have suffered great and irreparable damage by disuse and neglect; that there has been a natural depreciation in value of the concentrating plant, so that all of said attached property is not of sufficient value to more than satisfy said Charles D. McLure's judgment.

The bank, being unable to proceed in the state court, did, on the 8th day of January, 1907, file a petition in intervention in said action, and thereafter an amended petition in intervention, which was, on the 2nd day of February, 1907, on motion of said Charles D. McLure, dismissed. On the 12th day of January, 1907, the bank caused a writ of execution to be issued on its judgment, and the sheriff levied upon all the personal property of the company by serving notice, as provided by Section 895 of the Code of Civil Procedure, but the sheriff was unable to proceed further on account of the pretended lien of said Charles D. McLure.

The bank instituted this action in equity on the 25th day of February, 1907, so as to prevent a conflict between the jurisdiction of the state and federal courts, and prayed permission of the court to proceed under its execution upon its judgment, and prayed further that the court adjudge and decree that it has a first and prior lien upon all of said property by virtue of its attachment, and that the pretended lien of Charles D. McLure be declared

null and void, or in any event lost and abandoned; that his writ of execution be withheld, and that defendants be enjoined from selling any of said company's property, and for general relief.

To said bill of complaint the defendants filed a demurrer (Tr. pp. 26-7) upon the following grounds: First. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit. Second. That said plaintiff has not shown by its said bill that it has any right or interest in the said properties therein described which would entitle it to the relief thereby prayed. Third. That the facts and circumstances stated in said bill do not amount to a fraud. Fourth. That the bill does not set out distinctly the particulars of the fraud alleged, nor the manner in which the court or the plaintiff herein was misled or imposed upon. Fifth. That it appears upon the face of said bill that plaintiff has been guilty of laches, and is not entitled to the relief prayed, or to any relief in the premises. Sixth. That said plaintiff has not, in or by the said bill, made or stated such a cause as doth or ought to entitle it to any such discovery or relief as is thereby sought or prayed for.

The court thereafter, to-wit: on the 5th day of August, 1907, sustained said demurrer, and on the 6th day of August, 1907, entered a decree finally dismissing said bill of complaint.

ASSIGNMENT OF ERRORS.

Now comes the Great Falls National Bank, complainant, in the above-entitled cause, by its solicitor, and says that in the order of August 5th, 1907, and decree in said cause, entered on the 6th day of August,

1907, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors, committed or happening in said cause, and upon which it will rely on its appeal from said order and decree:

1. The court erred in its order of August 5th, 1907, in sustaining defendants' demurrer to complainant's bill of complaint in this, that the said demurrer should have been overruled.

2. The court erred in its said decree of August 6, 1907, in finally dismissing said bill of complaint, in that (a) the said bill of complaint set forth facts showing that the attachment of the defendant, C. D. McLure, was sought and made for the purpose of hindering, delaying and defrauding the creditors of the Diamond R Mining Company, and particularly the complainant herein, and was therefore void. (b) The said bill of complaint further set forth facts showing that whatever lien the said C. D. McLure may have acquired by virtue of said attachment, was waived, abandoned and lost by reason of his unreasonable delay and laches in having issued out of said court a writ of execution for the sale of the property upon which he claimed an attachment lien, and the rights of the said C. D. McLure thereby became subject and subordinate to the attachment lien of the complainant herein, and (c), the said bill of complaint set forth facts showing that the complainant was entitled to the equitable relief prayed for.

BRIEF OF THE ARGUMENT.

We will discuss the questions involved under five separate headings, to-wit:

First. The Circuit Court of the United States has jurisdiction of this case, and the remedy sought is the proper one.

Second. The defendant and appellee, Charles D. McLure, under the facts alleged in the bill, could not obtain a valid attachment lien in preference to the appellant bank.

Third. The attachment lien sought to be obtained by said Charles D. McLure was for the purpose of hindering, delaying and defrauding the appellant bank, and is therefore void, and the redemption of March 23, 1905, was likewise fraudulent and void.

Fourth. The attachment lien, even though valid in the first instance, was lost by delay in issuing a writ of execution for the sale of the property.

Fifth. This action is not barred by appellant's laches.

I.

The Circuit Court of the United States has jurisdiction of this case, and the remedy sought is the proper one.

In a case of a conflict of jurisdiction, the possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application

to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suit was brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to state and federal courts.

2 Bates on Fed. Eq. Pro., Sec. 613.

Morgan v. Sturgis, 154 U. S. 256; 38 L. Ed. 287.

Central Nat. Bank v. Stephens, 169 U. S. 432; 42 L. Ed. 807.

Farmers' Loan & Trust Co. v. Lake St. R. Co., 177 U. S. 51; 44 L. Ed. 667.

Krippendorf v. Hyde, 110 U. S. 276; 28 L. Ed. 145.

Covell v. Heyman, 111 U. S. 176; 28 L. Ed. 390.

Gumbel v. Pitkin, 124 U. S. 131; 31 L. Ed. 374.

Arrowsmith v. Gleason, 129 U. S. 86; 32 L. Ed. 630.

4 Cyc., 651-2.

II.

The defendant and appellee, Charles D. McLure, under the facts alleged in the bill, could not obtain a valid attachment lien in preference to the appellant bank.

In support of this proposition we are not now relying upon the many fraudulent acts and circumstances set forth in the complaint, for those will be discussed later. We are, for present purposes, simply relying upon the facts alleged to the following extent: That Charles D. McLure was one of the largest stockholders of the

Diamond R Mining Company, and was, until the 10th day of October, 1900, a director in said corporation; that he and his brother, L. S. McLure, together owned and controlled a majority of the capital stock of said corporation, and managed and controlled its affairs; that his brother, L. S. McLure, was its general manager and in the personal charge of its affairs, and after the 12th day of June, 1900, was also president; that said L. S. McLure was also, during all the times stated in the complaint, the agent and representative of Charles D. McLure, who was residing in the City of St. Louis, State of Missouri; that the attachment suit of Charles D. McLure was based upon moneys previously advanced, and was instituted after Charles D. and L. S. McLure had closed the company's properties and the company had ceased to do business; that said brothers acted together and in collusion in instituting said suit; that summons was served upon L. S. McLure, and judgment by default entered based upon said service.

The Court's attention is directed to a very interesting discussion by Judge Thompson as to the power of corporations to prefer creditors, found in Vol. 5 of Thompson on Corporations, Secs. 6492 to 6520, and in 10 Cyc. pp. 1246 to 1269. Judge Thompson, in Sec. 6492, supra, begins this discussion as follows:

"There are two doctrines upon this subject; one,—and the only one which is deserving of any respect,—is that the assets of the corporation are a trust fund for its creditors; that when the corporation becomes insolvent, or when its affairs reach such a state that its stockholders or directors find themselves obliged to deal with its assets in view of its approaching suspension, they can only

deal with them in the character of trustees for its creditors; that this necessarily means that they can only deal with them as trustees for all its creditors, and not for particular creditors whom they may desire to pay in preference to the others,— that is, to pay out of money which equitably belongs to the others. This doctrine, in short, is that a corporation being insolvent, or dealing with its funds in contemplation of insolvency, and not in the ordinary course of its business, has no power to prefer particular creditors."

Numerous authorities are cited in support of the author's position, and also some decisions holding to the contrary, the fallacy of which Judge Thompson clearly demonstrates.

He then proceeds to discuss the right of corporations to prefer their own directors who are creditors, which has been recognized by some courts, and then says: (Sec. 6503) "The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in the view of its probable suspension, they cannot use those assets to prefer themselves as creditors or sureties in respect of past advances, to the prejudice of its general creditors."

(Sec. 6504) "We therefore find that the view that directors, or other officers of a corporation, can, in the presence or in the prospect of corporate insolvency, prefer themselves as creditors in respect of debts previously contracted over other general creditors, is almost universally repudiated by the courts. * * * This obligation to hold the assets of the corporation as a trust fund for

equal distribution among its creditors attaches to the directors, not only when they have voted the corporation to be insolvent, but whenever the fact that it must discontinue business by reason of insolvency comes to their knowledge. The only sound principle is that the directors of the corporation cannot prefer themselves as creditors, either when it is in fact insolvent, or when its condition is such that the act is done by them in contemplation of its insolvency."

The author follows this discussion by the announcement of the following principle: (Sec. 6506) "The power of directors of insolvent corporations to prefer their own relatives stands in reason on much the same footing as their power to prefer themselves. It has been held that such directors cannot prefer their relatives who are corporation creditors. But where the rule of the particular jurisdiction allows the directors to prefer themselves, they can, for just as good reason, prefer their relatives."

In Sec. 6508, he says: "Where an insolvent corporation has no means to contest attachment suits, and where the result of efforts to dissolve attachments would be doubtful, it is not a breach of trust for the directors, on advice of counsel and in good faith, to make an advantageous sale of the corporate assets to an attaching creditor, on condition that he cancel his own debt and discharge the debts of the other attaching creditors."

Numerous decisions are cited in support of the above text, the more important of which, together with others upholding the same doctrine, are as follows:

Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496; 11 C. C. A. 320.

Howe, Brown & Co. vs. Sanford Fork & Tool Co., 44 Fed. 231.

Lippincott v. Shaw Car. Co., 25 Fed. 585.

Erwin v. Or. Ry. & Nav. Co., 27 Fed. 625.

White Mfg. Co. v. Pettus Imp. Co., 30 Fed. 864.

Adams v. Kehlor Milling Co., 35 Fed. 433.

Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7.

Sidell v. Missouri Pac. Ry. Co., 78 Fed. 724, 24 C. C. A. 216.

Chick v. Fuller, 114 Fed. 22; 51 C. C. A. 648.

Hart v. Globe Ins. Co., 113 Fed. 342.

N. W. Mutual Ins. Co. v. Cotton Exchange Real Estate Co., 70 Fed. 155.

Washburn v. Green, 133 U. S. 30; 33 L. Ed. 516.

McGourkey v. Toledo & Ohio C. R. Co., 146 U. S. 536; 36 L. Ed. 1085.

Drury v. Mil. & S. R. Co., 74 U. S. 299; 19 L. Ed. 40.

Sawyer v. Hoag, 17 Wallace 610; 21 L. Ed. 731.

Michaud v. Girod, 45 U. S. 503; 11 L. Ed. 1102.

Koehler v. Hubby, 67 U. S. 715; 17 L. Ed. 339.

Jackson v. Ludeling, 88 U. S. 616; 22 L. Ed. 493.

Upton v. Tribilcock, 91 U. S. 45; 23 L. Ed. 203.

Sanger v. Upton, 91 U. S. 56; 23 L. Ed. 220.

Hindman v. O'Connor, 13 L. R. A. 494.

Rouse v. Merchants' Nat. Bank (O.), 5 L. R. A. 378.

Arkansas Valley Agr. Society v. Erchholtz (Kas.), 25 Pac. 613.

Olney v. Conanicut Land Co. (R. I.), 5 L. R. A. 361.

Conover v. Hull (Wash.), 39 Pac. 166.

Compton v. Schwabacher (Wash.), 46 Pac. 340.

Adams v. Deyette (S. Dak.), 31 L. R. A. 497.

Portland Con. Mining Co. v. Rossiter (S. Dak), 94 N. W. 702; 102 A. S. R. 726.

Slack v. Northwestern Nat. Bank, 103 Wis. 57; 74 A. S. R. 841.

Nixon v. Goodwin (Cal.), 85 Pac. 169.

3 Clark & Marshall on Corporations, pp. 1937, 2423-4.

In Lippincott v. Shaw Car. Co., 25 Fed. 585, the Court, after holding that the indebtedness for which the mortgage in question was given was contracted in good faith, nevertheless decides that the mortgage was invalid because two of the directors were endorsers upon the note secured thereby, and says: "In manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule, and the only rule which can be administered with uniformity and fairness."

In Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7, an action brought by creditors to set aside a trust deed, the Court said: "The deed of trust was in effect a confession of insolvency; it conveyed all the company had to meet only a part of its liabilities. It took away the ability of the directory to further prosecute the object of the franchise. While the corporate autonomy was not extinguished in law, it exists merely in a state of suspended animation, with no reasonable hope or assurance of resuscitation. When a corporation in its business affairs is thus in articulo mortis, whatever may yet be maintained on divided opinions as to its right to dispose of its property so as to give a preference

to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion, that its directors cannot make a disposition of the assets to secure to themselves, directly or indirectly, a preference over general creditors."

In Howe v. Tool Co., 44 Fed. 231, Judge Woods thus expressed himself: "A sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, as it may be, exclusive knowledge of the corporate affairs into means of self protection, to the harm of other creditors; they ought not to be competitors in a contest of which they must be the judges. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be, in ordinary cases, no means of discovering the truth, and consequently the presumption to the contrary should in every case be conclusive. Besides inconsistent with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence."

In Mfg. Co. v. Hutchinson, 11 C. C. A. 320, Justice Harlan discusses this subject at some length, and among other things says: "The law in effect says to all who deal with private corporations that they must look to this property as the only security for the fulfillment of its obligations, and if the law gives this assurance to creditors of a corporation, those who are authorized to represent it in its dealings with the public, who control and manage its property, and upon whose fidelity and integrity

the public, as well as creditors, rely, ought not to be permitted, when the corporation becomes insolvent and abandons the objects for which it was created, to appropriate to themselves as creditors any more of the common fund in their hands than is ratably their share. Those, therefore, who hold fiduciary relations to creditors ought not to be allowed by any form of proceeding, or by their own act, after the corporation is practically extinct, to appropriate its property for their special benefit, to the injury of those who, upon every principle of justice, have equal rights with themselves."

The case of Adams v. Kehlor Milling Co., 35 Fed. 433, is very much like the case at bar so far as the principles involved are concerned, and in his opinion Judge Thayer said: "It may be conceded that a corporation, though insolvent, has the power to prefer creditors, but the relation which directors bear to the corporation as trustees of its assets is such that they cannot lawfully exercise the power in question for their personal advantage. It is but an application of the same principle to say that if the directors of an insolvent corporation in the distribution of its assets pay a certain creditor in full to the exclusion of others, the choice ought not to be influenced solely by relationship existing between the directors and the creditors so preferred, or by other considerations of a purely selfish nature. In the present case it was the estate of a deceased director and president of the corporation that was preferred. The majority of the board were brothers of the deceased. One of them was agent for the estate and controlled and voted its stock at corporate meetings. The interest of the estate was as effectually represented in the board at the time the preference was

given by and through J. B. M. Kehlor, its agent, as it could have been by the deceased director himself." It was therefore held that a preference given to the estate of J. C. M. Kehlor, who in his life time had been a director of the corporation and its largest and most influential stockholder, was unlawful."

The case of Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co., 70 Fed. 155, was very much like the case at bar, in that the beneficiary of the preference, A. G. Black, was not a director, but was a large stockholder, residing out of the state, and commenting on this the Court said: "It would be a travesty of justice if this non-resident stockholder could be permitted to organize a business corporation under the laws of this state through a mere resident figurehead, and while taking to himself the protection of the laws of the state and the benefits of the corporation as a real manager, he could escape the just responsibilities attaching to the office of a director. The law looks to substance rather than form. A court of equity has no respect for mere shams."

In Nixon v. Goodwin (Cal.), 85 Pac., on page 172, the Court says: "The rule is that a director of an insolvent corporation cannot receive to himself any preference or advantage over other creditors in the payment of his debt. And surely the same rule would apply with equal force to one who is a large creditor of a corporation of which he is a director and the president, and who resigns today that he may tomorrow accept a conveyance to himself of the corporation's property. * * * Under the circumstances in this case, that all the debts owing by the corporation were contracted while defendant was

a director, and presumably contracted at his instance and request, as he was president, it seems to us the deed made to him on April 3rd, the day after he had resigned, was just as fraudulent and void as if it had been made April 1st and while he was yet a director. Could he thus divest himself of his trust relations so that he might make legal the act which the law declares illegal while a director? I think not, for the same undue advantage which the law prohibits is still exercised. A director of a corporation may advance money to it, may become its creditor, may take from it a mortgage, or any other security, and may enforce the same like any other creditor, but always subject to severe scrutiny and under the obligation of acting in the utmost good faith. The officers of a corporation hold its property in trust for its stockholders, and incidentally for the creditors, and any transaction on the part of the directors which is tainted with fraud, or any violation of the duties of their trust, is voidable."

The case of Slack v. Northestern Nat. Bank, 103 Wis. 57, also contains language quite pertinent to the case at bar: "To say that legally elected officers cannot prefer themselves, but that persons who are in fact acting as officers and managing the business can prefer themselves, would seem an anomaly in the law. Such a holding sacrifices substance to form, and would open an easy way by which the assets of the insolvent corporation could be divided up among persons who were officers de facto but not de jure. The law is guilty of no such absurdity. In this case, the defendant, through its officers, was, in fact, managing the affairs of the savings bank; it could no more prefer itself out of the assets of the savings bank

when it was insolvent, and was on the verge of suspension, than could legally elected directors, and for the same reasons. This seems to us good sense and good law, and it does not infringe upon the doctrine that a mere creditor of an insolvent corporation may, by voluntary transfer in good faith, receive and hold property of the corporation in payment of his debt, or as collateral thereto."

In Sidell v. Missouri Pac. Ry. Co., 78 Fed. p. 727, the Court says: "When a majority of the stockholders of a corporation combine to effect some predetermined scheme of corporate action, and by their vote select a body of directors to carry it out, they practically constitute themselves the corporation for that particular object, and assume the fiduciary relation which the directors themselves occupy. Ervin v. Navigation Co., 27 Fed. 625; Farmers' Loan and Trust Co. v. New York and N. Ry. Co., 150 N. Y. 410, 44 N. E. 1043. The same result follows when one individual, or a corporation, exercises this control by its majority voice and vote. If the corporation is insolvent, this trust relation towards creditors forbids the majority stockholder from appropriating for his own advantage the property or fund in which all have a community of interest. Jackson v. Ludeling, 21 Wall. 616."

In Washburn v. Green, 133 U. S. 30, the Court says: "Richardson's relation to the subject matter of this controversy was threefold: (1) That of a creditor of an insolvent corporation, claiming for his debt priority of payment over those of all other creditors, out of a fund from a foreclosure sale of the mortgaged property; (2) That of a director and officer of that corporation at the

time his debt against it was created, and (3) That of the largest stockholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security. But courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care, and unless satisfied by the proof that the transaction was entered into in good faith with a view to the benefit of the company as well as of its creditors, and not solely with a view of his own benefit, they refuse to lend their aid to its enforcement." The Court goes on to quote approvingly from Sawyer v. Hoag, 17 Wallace 617, as follows: "It is therefore but just that when the interest of the public, or of strangers dealing with this corporation, is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

Without quoting further from the foregoing decisions, the application of the principles therein announced to the case at bar is thus stated in 6 Thompson on Corporations, Sec. 7796: "The doctrine that the assets of a corporation are a trust fund for all its creditors, and that its directors, as the custodians and trustees of this fund, are bound, in the event of insolvency, or of anticipated

insolvency, to deal with it for the equal benefit of all the creditors, and are prohibited from so dealing with it as to secure preferences to themselves as creditors over other creditors, operates, of course, to prevent them from obtaining such preferences by the abuse of legal process. They cannot, for instance, obtain such preference by causing the corporation to confess judgment in their favor. Obviously, they will not, for the same reason, be allowed to get such a preference by attachment. The inequity of allowing such a preference is obvious, since they themselves create the conditions which give ground to attachment, and will ordinarily have knowledge of the existence of those conditions prior to any other creditor."

In Portland Con. Mining Co. v. Rossiter, 16 S. D. 633, 94 N. W. 702, the Court says: "The conclusion reached in Adams Co. v. Deyette, 5 S. D. 424, that the directors of an insolvent corporation, as trustees for all creditors, are bound to preserve and equally administer all of the property in the interests of all of the creditors, and are incapable of preferring one another, is broad enough to include a judgment by default secured principally for their exclusive benefit and by service of the summons upon themselves. It would be inequitable to judicially sanction this judgment and execution sale of all the corporate property, aggregating $45,000.00, in satisfaction of an antecedent debt of less than one-half that amount, two-thirds of which is owned by directors of the insolvent corporation charged with the legal obligation of protecting the paramount rights of creditors."

To successfully maintain the proposition stated at the beginning of this subdivision of our brief, it is unneces-

sary to go as far as Judge Thompson and other eminent authorities have gone in their treatment of the so-called "trust fund" doctrine. We do not need to take the position that a corporation in contemplation of insolvency cannot give a preference to any of its creditors under any circumstances. We simply contend that Charles D. McLure occupied such a relation to the Diamond R Mining Company and to the appellant bank that the preference sought to be obtained by him was unlawful. While there is conflict of authority as to the general application of the "trust fund" doctrine, the decisions and text-books are practically united in holding that a creditor in McLure's position could not obtain a valid preference. The decisions of the federal courts are substantially as one on this proposition, as we have shown. It is of no moment that McLure was not a legal director of the company when he attached. He was in fact much more than a mere member of the board of directors, for he and his brother together owned and controlled a majority of the capital stock and absolutely controlled and dominated the business and affairs of the company. L. S. McLure, the president and manager of the company, was also the agent and representative of Charles D. McLure. Charles D. McLure did not need to be a member of the board, for he had his agent and representative there in the person of his brother. As some of the courts from which we have quoted stated, "the law looks to substance rather than form, and a court of equity has no respect for mere shams." In contemplation of law, the directors manage and control the business of a corporation, but in this case, as a matter of fact, these powers were usurped and exercised by these two stockholders alone. The principles

upon which the rights of a corporation's creditors are founded are too firmly established in equity jurisprudence to be frittered away by a mere quibble as to the official title of those in charge of a corporation's affairs. The foundation of the principle alluded to is that the directors, or "managing agents" as many of the courts express it, are in a peculiar position of advantage over other creditors, and should therefore be prohibited from obtaining a preference of any character. To allow C. D. McLure to withdraw himself from the operation of this principle, in view of the facts pleaded, would make it easy for any designing stockholder to circumvent the application as to him of this wholesome equitable doctrine.

It was clearly a fraud in law for L. S. McLure, the president and manager of the corporation, to act also as the agent and representative of his brother where a conflict might arise, and as Charles D. McLure necessarily knew that L. S. McLure was occupying this dual position he thereby became a party to the fraud. These principles, so well recognized in equity, are emphasized in Montana by the following provisions of the Civil Code:

Sec. 2970. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Sec. 2971. A trustee may not use or deal with the trust property for his own benefit, or for any other purpose unconnected with the trust, in any manner.

Sec. 2972. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in

which he or any one for whom he acts as agent has an interest, present or contingent, except as follows: 1. When the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. 2. When the beneficiary, not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or, 3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed.

Sec. 2973. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

Sec. 2974. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

Sec. 2975. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

Sec. 2976. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust.

Moreover, at the time the loan was made by the appellant bank, Charles D. McLure was in fact one of the directors of the company. He also agreed to repay said

moneys to the bank. This promise led the bank to believe that it would not be obliged to bring suit to enforce payment. McLure's failure to keep this promise, followed by his attachment of all the company's property, was clearly a fraud upon the rights of the bank, and it would be most inequitable and also shocking to one's sense of justice to permit him, after all this, to obtain and hold a valid lien, and thereby prevent the bank from recovering the moneys which it had advanced.

As showing the position which the Supreme Court of Montana has taken with reference to the duties and obligations of those occupying fiduciary relations to corporations, we cite the following:

Coombs v. Barker, 31 Mont. 526.

McConnell v. Combination M. & M. Co., 31 Mont. 563.

In the first case, wherein the court set aside a redemption made by some of the directors and stockholders of a corporation from a sheriff's sale, where no opportunity had been given to the stockholders to protect their interests, the Court says: "Counsel cite numerous cases holding that a director may become a purchaser of corporate property at a judicial sale when such sale is made by another creditor and when the director has no control over the proceeding. We also agree with this doctrine, subject to the qualification, however, that the acts of the director must be fair and honest, and he be not permitted to obtain any dishonest advantage over the corporation or stockholders. * * * Counsel for defendants claim that there is no fraud in fact alleged against the defendants in the complaint. Whether this is true we deem immaterial. A breach of official duty on the part of the

defendant directors is clearly alleged and relied upon. This is a fraud in law and sufficient to warrant relief if proven."

The Court in that case, coming to a consideration of the rights of one of the stockholders who participated in the redemption, but who was not a director, says: "Being present at the time the redemption was agreed upon, and taking part therein and joining in the redemption in the manner as shown by the record, conclusively satisfies us that he should be charged with knowledge that the transaction was constructively fraudulent, and therefore he stands in no better position than the directors involved. He being the agent of Mrs. Collins in the redemption, she is charged with all the knowledge he possessed. (Sec. 3112, Civil Code.)"

In another part of the opinion, the Court says: "Neither is there any explanation offered as to why the summons was not served in the usual way upon the defendant corporation, or why notice of the pendency of the suit was not given to any one except the directors who took part in the redemption. There is too much opportunity for fraud under such circumstances to maintain them in absence of any explanation. The directors may have conspired among themselves to allow this judgment to be entered so short a time before the redemption, to take an assignment of the judgment and redeem the property to the utter exclusion of all the other stockholders. The manner of showing the bona fides of the transaction was, if such was the fact, clearly within the power of the directors. They sit by silently and say nothing, and this Court, under the circumstances detailed, cannot say that their acts were bona fide and sufficient

to maintain their position."

In the other Montana case cited, the Court says: "As to the stockholders the directors are trustees, besides being agents of the company and stockholders, and may not be permitted to so deal with the trust property as to secure therefrom a profit to themselves."

A reading in full of the Montana decisions will show that they are in line with the decisions of almost all the federal and state courts in holding that in all contracts and transactions between a corporation and those standing in a fiduciary relation to it, the burden is upon the latter to show that the transaction was fair and honest and not for the purpose of obtaining any advantage over the stockholders or creditors of the corporation.

Even those courts that do not uphold the so-called "trust fund" doctrine nevertheless uphold the principle just announced, and we cite below some of these decisions; which clearly uphold us in our contention that our bill of complaint states a cause of action, even though they may not go so far as other courts have gone:

Regan v. First Nat. Bank (Ind.), 61 N. E. 583.

Citizens' Nat. Bank v. Goshen Woolen Mill Co. (Ind.), 69 N. E. 206.

Roberts & Co. v. Victor, 130 N. Y. 585; 29 N. E. 1025.

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Illinois Steel Co. v. O'Donnell, 156 Ill. 624; 31 L. R. A. 265.

In Citizens' National Bank v. Goshen Woolen Mills Co., supra, is found a very exhaustive discussion, with numerous authorities cited, pro and con, upon the trust fund and kindred doctrines, and while the court

recognizes the right of a corporation, under certain circumstances, to prefer creditors, it nevertheless says: "It would seem to violate the very spirit of equity to permit these managing agents and trustees, when the corporation becomes insolvent, to act as grantors for the corporation in distributing to themselves as grantees the remaining assets of the corporation upon their own unsecured antecedent claims to the exclusion of other unsecured creditors."

In the case of Illinois Steel Co. v. O'Donnell, supra, the Court points out a very reasonable distinction between good and bad preferences, as follows: "A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith and for the apparent benefit of such corporations, from loaning their money, and at the same time taking from them security for repayment,— the terms and the securities being such as are in accord with the usual course of business,— would be highly injurious to corporations themselves and frequently detrimental to the interests of their creditors. The line of demarcation that separates valid from invalid preferences to directors or officers of insolvent corporations, lies between already incurred liabilities and liabilities assumed by going corporations at the time the securty is given and taken." This is in harmony with the decision in Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

III.

The attachment lien of Charles D. cMLure was made to hinder, delay and defraud the bank, and is therefore void.

We have, in the previous discussion, contended that Charles D. McLure's position with relation to the mining company and the appellant bank was such as to render his attachment lien invalid. The bill of complaint, however, does not stop with the simple allegations of what would constitute fraud in law. It alleges also that "the said attachment by the defendant herein, Charles D. McLure, as plaintiff in said cause, was not sought or made in good faith as stated in his affidavit therefor, but was made and the said action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant and other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court." (Tr. p. 11, lines 22-28; p. 12, lines 1-3.)

Under Sec. 891, Subdivision 2, of the Code of Civil Procedure of the State of Montana, it was necessary for McLure, in order to procure the issuance of a writ of attachment, to make an affidavit stating, among other things, "that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant." This affidavit is the foundation of the attachment, and it goes without saying that, before the plaintiff's attachment in that action can be upheld as to creditors, the facts must be as alleged in the affidavit, and the complainant herein now seeks to show, as it has a right to do, that said attachment was not made in good faith, but for the purpose of hindering, delaying and defrauding the complainant. It is unnecessary to cite authorities showing that the complainant is not bound or concluded by the judgment in that case, to which it

was not a party, and necessarily it is not bound or concluded by the proceeding in attachment to which it was not a party.

In this connection, we wish to call the Court's attention to Sec. 4490 of the Civil Code of Montana, which is as follows:

"Every transfer of property, or charge thereon made, every obligation incurred, every judicial proceeding taken, and every act performed, with intent to delay or defraud any creditor or other person of his demand, is void against all creditors of the debtor and their representatives or successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

While the law would doubtless be the same without this provision of our code, yet any question as to the law is removed by this specific provision, rendering void as to creditors every judicial proceeding taken with intent to delay or defraud any creditor.

Similar allegations are contained in the bill attacking the judgment in the case, thereby bringing into issue the validity of the whole proceeding. It is alleged, too, that the moneys sued for by McLure were advanced to the company for the purpose of enlarging its concentrator, and that they were borrowed under the promise and agreement of McLure that he would consolidate the Broadwater Group of Mines, then owned by him, with the mines of said company, but which promise and agreement he never kept, there being thereby a failure of consideration for the notes sued on by McLure. (Tr. pp. 12-13.)

Numerous allegations are contained in the bill showing

the bad faith, fraud and collusion of the two McLures. Reference is made to the complaint for a detailed statement, as we will confine ourselves here only to this very brief summary, in addition to what we have already mentioned, to-wit:

That the hundred ton concentrator first erected had been operated successfully and profitably in concentrating ores on the dump of the company's mines as intended; that the two McLures enlarged the concentrator to a three hundred ton capacity, for which Charles D. McLure advanced the money afterward sued on; that the concentrator was then used by Charles D. McLure for his sole benefit in concentrating ores from his own mines, at a loss to the company; that the concentrator was reasonably worth $175,000.00, if used as intended, and the mine and concentrator taken together were worth $500,000.00 and the mines could have been worked and operated at a profit, as the two McLures well knew, but, nevertheless, the said McLures, acting in collusion for the purpose of cheating and defrauding the complainant, closed down the concentrator, failed and refused to open the company's mines, and at once instituted the attachment suit; that they have kept one of their employes in charge of all said property, and have deprived the company of the use and enjoyment of the same; that the two McLures, acting collusively and fraudulently, took no steps whatever to redeem a portion of the concentrator from the sale made to Bartlett, or to protect the interests of the stockholders or creditors, but Charles D. McLure redeemed the same for himself by paying the insignificant sum of $1,930.25, and thereafter taking a sheriff's deed; that this act caused a great depreciation in the plant by

the attempted segregation of a portion thereof, and on that account, and by reason of their delay of five years in proceeding any further, the property has depreciated in value so that it would not sell for more than enough to satisfy McLure's judgment. (Tr. pp. 12-18.)

All of these acts are charged to have been done by the McLures with the intent to hinder, delay, cheat and defraud the complainant, and it is alleged that the complainant will not be able to realize on its judgment unless the lien claimed by McLure under his attachment and judgment is set aside.

In view of all these facts as alleged, how can any court say that there is no equity in complainant's bill? The books are full of cases wherein the courts have granted redress to complainants whose grievances fall far short of those here complained of. Here is a case of a clear and deliberate scheme and conspiracy to wreck a corporation. A concentrator has been erected, which has successfully and profitably treated the ores already on the dump of the company's mine, and so successful has it been that it is enlarged so as to treat three hundred tons per day. McLure himself is so impressed with the success of the enterprise that, as the principal stockholder and beneficiary, he advances $75,000.00, or thereabouts, for this enlargement of the plant. While this work is going on, request is made of the Great Falls National Bank to advance $20,000.00 to meet urgent current expenses in connection with the work. The bank grants this request and lends the money to the company, but as a matter of prudence, knowing that Charles D. McLure was the principal stockholder and was advancing the bulk of the money, only made this loan with the

understanding that Charles D. McLure would repay it. McLure was at all times a resident of St. Louis, and what was done was necessarily through his agent, L. S. McLure, but he later promised to pay this money. The bank's money was thus used in the completion of the plant, but when completed the two McLures, having control of the company's affairs, used the concentrator for C. D. McLure's personal benefit instead of for the benefit of the company as was intended. The mines of the company were valuable, which the McLures knew, but they nevertheless refused to carry on the business of the corporation, closed down the concentrator and brought the attachment suit. If this sort of conduct can be tolerated by any court, it is within the power of one or two stockholders, who get control of a corporation, to absolutely defeat its object, and then appropriate to themselves exclusively what has been largely paid for by the other stockholders and creditors.

We confidently submit that this Court will not say, in view of all these allegations, that this bill of complaint does not state a cause of action, or that complainant is not entitled to relief.

We dare say that, in the multitude of cases which have come before the courts involving similar questions, not one decision can be found upholding acts and proceedings such as are complained of in this case. Where a preference by a corporation has been upheld, the facts have shown that it was for the purpose of securing moneys advanced for the benefit of the corporation and to enable it to carry out the object of its existence, and the preference thus allowed to stand has been given at the time the moneys were so advanced. There is no

similarity between such cases and the one at bar.

Counsel for appellees will doubtless argue before this Court, as they have before the Circuit Court, that enough does not appear in the bill of complaint to show that there was any valid defense to the action at law brought by Charles D. McLure against the Diamond R Mining Company, and that for this reason the appeal should be dismissed. While we disagree with counsel, and submit that the bill sets forth facts showing a failure of consideration for the note sued on, and that the judgment against the company could properly be set aside on that ground, yet we wish to say further that counsel entirely misapprehend the purpose of this action if they consider that it is simply based upon the attack made upon the judgment itself. While the setting aside of the judgment would necessarily carry everything else with it, yet the appellant, as an attaching and judgment creditor, is affected and prejudiced, not by the judgment recovered by McLure, but by the lien which he claims to have under his attachment. It is this lien and not the judgment which stands as an obstruction and hindrance to the enforcement of the complainant's judgment.

In practically all of the cases that we have heretofore cited, no question has been raised as to the indebtedness of the creditor whose preference has been attacked. The preference itself, whether by mortgage, deed of trust or attachment, and not the indebtedness, has been the subject of consideration. It matters not to appellant what the court may do with McLure's judgment, no matter how fraudulent it may be in law and in fact, so long as the court shall decide, under the facts pleaded, that the attachment lien claimed by McLure is an illegal prefer-

ence and that the proceedings thereby instituted by him were void under Section 4490 of the Civil Code of Montana.

We wish now to say a few words with reference to the redemption of that portion of the concentrator first constructed and sold by Bartlett under foreclosure proceedings. In paragraph 8 of the bill (Tr. p. 14) it is alleged "that the defendant Charles D. McLure, and his brother, L. S. McLure, acting collusively and fraudulently, took no steps whatsoever to redeem said property for the company, or to protect the interests of the stockholders or creditors thereof, but on the 23rd day of March, 1905, the defendant, Charles D. McLure, redeemed the said land and premises from said sale for himself by paying to the said sheriff the sum of $1,930.25." In paragraph 9 (Tr. p. 16) it is further alleged "that said McLures acted in collusion, and with the same fraudulent purpose and design, in making no reasonable effort to pay the said claim of said George F. Bartlett, and permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said property in the manner aforesaid, to the great damage, loss and injury of this complainant, etc." The damage and injury to the entire plant by this sale and redemption is also pleaded in the bill. (Tr. p. 17.) The facts with reference to this sale and redemption are set forth as a part of the general conspiracy and scheme to defraud the complainant.

We submit that a court of equity should not permit McLure, under the facts and circumstances disclosed, to hold this portion of the concentrator, which cost $75,000.00, and which is part and parcel of the complete concentrating plant, by his payment of the paltry sum of

$1,930. The inequity of such a thing is too glaring to require comment, even though McLure, in effecting such redemption, was exercising a statutory right, as his counsel contend. The two McLures occupied such a relation to the corporation as made it incumbent upon them to use some diligence in an effort to save its property for the stockholders. The stockholders and creditors had a right to look to them, as the men actually in charge of the company's affairs, to take whatever steps might be necessary. They, however, did nothing; they allowed the property to be sold without calling the stockholders or directors together for the purpose of seeing what might be done. McLure allowed his attachment and judgment to stand from January 16th, 1902, until March 23rd, 1905, so that by virtue thereof he might have the "statutory right" of redemption by paying $1,900.00 for property worth $75,000.00, and still have his judgment for $86,000.00 left. The citation of authorities ought not to be necessary to move a court to condemn this whole transaction. If it be necessary, however, the decision of the Supreme Court of Montana in the case of Coombs v. Barker, together with Jackson v. Ludeling, 88 U. S. 616, and Ervin v. Or. Ry. & Nav. Co., 27 Fed. 625, heretofore cited, ought to be sufficient. This redemption proceeding was clearly an "act performed with intent to delay and defraud the complainant of its demands," and therefore void under Section 4490 of the Civil Code of Montana.

IV.

The attachment lien, even though valid in the first instance, was lost by delay in issuing writ of execution for the sale of the property.

It is held that the abandonment of a levy may be presumed from delay in enforcing the same.

11 Am. & Eng. Enc., 692.

18 Am. & Eng. Enc., 100.

An attempt to use an execution for the purpose of security merely is a perversion of the writ, and postpones it and the lien thereof to other liens or executions subsequently issued or accruing.

17 Cyc. 1058.

Barnes v. Bellington, 2 Fed. Cas. 1015.

Berry v. Smith, 3 Fed. Cas. 1359.

"An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity towards the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent

executions. Rarely has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant."

2 Freeman on Executions, 206.

Williams v. Mellor, 12 Col. 1; 19 Pac. 842.

Hall v. Hall (Tenn.), 24 Am. Dec. 590.

Owens v. Patterson (Ky.), 44 Am. Dec. 780.

In a well considered case, the Supreme Court of Illinois has held that fraud operates as a legal conclusion through the consent of the judgment creditor to the postponement of a sale under execution.

Sweetser v. Matson, 39 N. E. 1036; 27 L. R. A. 374 and notes.

It is contended by appellee McLure that, by virtue of Sec. 1210 of the Code of Civil Procedure of Montana, he was at liberty to have a writ of execution issued to enforce his judgment at any time within six years, and that the property held under attachment became liable to execution taken out during such period. It is true that this is the time fixed by the statute within which execution may issue, but we contend that this right must be exercised in harmony with the general principles applicable to executions, as we have given them from Freeman and other authorities. That this time has been fixed by statute does not mean that a plaintiff in an action may levy upon property and use the lien thereby acquired for the purpose of security merely, to the detriment and

injury of other creditors. Besides, so far as levy under writ of attachment is concerned, the Montana laws do not attempt to fix the period of time during which it may be kept alive. While an attachment lien is considered as merged in the judgment or execution lien (if there be such), yet in order to preserve the rights acquired as of the date of the attachment, as distinguished from the date of the judgment or execution lien, certainly the general principles above stated, in the absence of statutory provision, should govern, and the plaintiff should proceed to sell the property attached within a reasonable time. In this case McLure's judgment, rendered in Lewis and Clark County, did not become a lien on real estate in Cascade County, but, as the bank had a prior lien by attachment anyway, we need not discuss this. The levy under McLure's writ of attachment was made on the real estate on the 16th day of December, 1901, and the levy on the personal property on the 18th day of December, 1901. No attempt whatever was made to sell the property until the 10th day of January, 1907. This was unquestionably an unreasonable delay. Possibly circumstances might arise in some extreme cases to justify such delay, but none appears in this case. We recognize that the authorities make some distinction between levies upon personal property and levies upon real property. This is based upon the fact that personal property is levied upon by taking possession, while real property is levied upon simply by filing notice with the proper officer.

In the case at bar there ought to be no question as to the abandonment or loss of the levy made upon the personal property. In this connection, we call the Court's

attention to the fact, too, that in paragraph 5 of the bill of complaint (Tr. p. 8), it is alleged that under the complainant's writ of attachment the "sheriff made his levy upon all the personal property by taking possession thereof simultaneously with the said United States marshal, but said possession having been thereafter surrendered by reason of the interference and obstruction of the said marshal, and the said Tripp continued to hold possession of all said property." The levies in the first instance, therefore, upon the personal property were equal in point of time, and the sheriff only surrendered possession because of the necessities of the case. The marshal failed to sell the property for over five years, and clearly lost whatever rights he had previously acquired.

Again, it is alleged in the bill, paragraph 11 (Tr. p. 19), "that on the 12th day of January, 1907, complainant caused a writ of execution to be issued upon its said judgment; that in pursuance thereof the sheriff of Cascade County levied upon all the personal property of the defendant by delivering a copy of said writ of execution, together with a notice, to said John L. Tripp, who was then and there in possession and control of the same, stating that all personal property in his possession and under his control belonging to the defendant company was attached in pursuance of said writ, as provided by Section 895 of the Code of Civil Procedure of the State of Montana; that said sheriff is unable to proceed further with the service of said writ of execution on account of the pretended lien of the defendant, Charles D. McLure."

Section 895 referred to authorized a levy in the manner stated where the property was in the possession of a third

party. Appellant therefore clearly had, and still has, a prior lien upon all the personal property, both by reason of the abandonment of his levy by McLure and the later levy made by the appellant, but to prevent a conflict between the state and federal courts, under the authorities cited at the outset in our brief, it would be impossible for the appellant to proceed further, even as to the personal property, without permission of the Circuit Court, which it is now seeking.

While the situation with reference to the personalty would of itself make it incumbent upon the court to overrule the demurrer to the bill, it is, however, the real estate covering the mines and concentrator of the Diamond R Mining Company with which we are chiefly concerned. To determine whether a different rule should apply in this case to the real estate than to the personal property, it would be well to consider the principle involved. The principle governing in this matter is quite clearly set forth in a decision relied upon by counsel for appellees, to-wit, Lant v. Manly, 75 Fed. 627, wherein Judge Taft says: "It is true that the duty of the judgment creditor to use reasonable dispatch in levying the execution upon the personal property attached before judgment is imperative, and if the property here seized were personal, the contention of appellees might succeed, but it is real estate, and with respect to attachments on that kind of property we conceive that a somewhat less strict rule of diligence applies. Personal property can only be attached by actual seizure by the sheriff, marshal or other executive officer. The lien on it can only be maintained by its manual retention in official custody. A release of it by the attaching officer for any purpose destroys the

lien. The necessity for excluding the owner from beneficial enjoyment in the thing attached has justly given rise to the requirement that when his judgment is obtained the attaching creditor shall speedily satisfy it out of that which he has so long withheld from the defendant owner. If no execution is issued upon a judgment within a reasonable time, the lien is to be regarded as abandoned, because the defendant owner of the attached personalty may justly complain that if he is not to have the use of it, he ought, at least, to have it sold and the proceeds of it applied to the payment of his debts. We are not prepared to deny that a lien on real estate secured by attachment, might be abandoned by great delay in levying execution, especially where the rights of third parties may have intervened between attachment and execution, but there is nothing of the kind in the case at bar. * * Taking into consideration the real nature of the attachment, we think that, in a case where the rights of third parties do not intervene, no delay in the execution, after judgment, ought to destroy the lien, if it fall short of clearly indicating an intention to abandon the same. Does a delay for nine months in this case indicate such an intention on the part of the complainant? We are very clear that it does not. In Speelman v. Chaffee, 5 Col. 256, it was held that the delay of a year in issuing execution, after judgment, on an attachment on personal property, was not unreasonable or such as to indicate abandonment. If this be a sound view in the case of personality, then, for the reasons stated, a delay of nine months in case of real estate ought certainly not to work an abandonment."

This decision clearly recognizes that a lien on real

estate, as well as on personal property, may be lost by delay. In the case at bar, the bill contains averments which clearly bring it within the doctrine announced by Judge Taft, for in paragraph 10 thereof (Tr. pp. 17-18), complainant alleges "that since the said attachment said defendant, Charles D. McLure, by keeping said John L. Tripp in the possession and control of said property, both real and personal, under said attachment, has deprived the said Diamond R Mining Company and its stockholders of the possession, use and enjoyment of all said property, and its mines have suffered great and irreparable damage and injury by disuse and neglect during said period of time." There is, therefore, sound reason for holding that McLure has lost whatever rights he may have acquired by levy upon the real property as well as upon the personal property.

Furthermore, to hold, as the Circuit Court did, that McLure had the full period of six years under the statute to issue execution, and drawing the conclusion therefrom that a lien could not be lost during such period, is to ignore all the facts and circumstances set forth in the bill showing that this delay was for a fraudulent purpose. There are many rights conferred by statute that a party may be free to exercise so long as he does not do so for the purpose of defrauding others. The statutes, for instance, declare the manner in which a party may execute a deed, mortgage or other instrument, but, if it be shown that this right is exercised for a fraudulent purpose, then the act is illegal and invalid, no matter how strictly it may conform to the statutory requirements.

The only case that we have been able to find that seems

directly in point is by the Supreme Court of Michigan. A statute was passed in that state enacting that all levies upon real estate theretofore made should cease to be a lien at the expiration of five years from the time the act became a law, and that all levies thereafter made should become and be void after the expiration of five years from the making thereof. The court held that a lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale "where no fraudulent purpose is shown on the part of the execution creditor."

Ludeman v. Hirth, 96 Mich. 17; 35 A. S. R. 588.

The Court in the above case also cites the following Michigan case, wherein the Court said: "It is also urged on the part of the complainant that a levy thus made and allowed to stand may be used for the fraudulent purpose of assisting the debtor in hindering and delaying other creditors in the collection of their demands. This is possible perhaps under some circumstances, but there is nothing in this case to indicate any such purpose. The evidence tends to show that the officers of the bank delayed proceeding to a sale under some expectation of receiving their money without doing so, and no ground is furnished by the evidence for suggesting collusion with the judgment debtor. We know of no ground for holding a levy, duly made and notified, void from the mere lapse of less than half the life of a judgment. The good faith of the bank is not successfully assailed in this case, and we are therefore of the opinion that there was no ground for setting aside its levy."

Ward v. Citizens' Bank, 9 N. W. 437.

The cases cited clearly recognize that an attachment lien may be lost if the creditor delay the sale for a fraudulent

purpose, and even where the statute fixes the life of the attachment. That this principle is applicable to the case at bar is unquestioned in view of the averments in the bill (par. 9, Tr. p. 16) that "the McLures were acting in collusion and in fraud of the rights of the complainant when they delayed for five years to take any steps whatever to sell the property held under attachment," etc., (par. 8, Tr. pp. 14-15) that they kept the judgment alive until after March 23, 1905, when it was used as the basis of redeeming the portion of the concentrator costing $75,000.00 by paying $1,930.25, and (par. 10, Tr. p. 17) that while the whole plant was worth $500,000.00 at the time of the attachment yet owing to said redemption and damage by disuse, neglect, etc., all of said property is not now of sufficient value to more than satisfy McLure's judgment, and (par. 6, Tr. pp. 11-12), that "the attachment was made and the action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant out of its demands, and the said proceedings will have the effect so intended unless set aside by this Court." In fact, the purpose and effect of this delay must necessarily be considered in connection with all the allegations of the bill, from which it clearly appears that this delay was a part of the whole fraudulent scheme. It is a matter to be judicially recognized that this judgment has been bearing the legal rate of interest (8 per cent.), so that by the time of the sale as advertised, instead of being $86,180, it amounted to over $120,000; in other words, it was almost half again as large. McLure has by his delay thereby increased his claim almost one-half and has added that much to the obstruction in the way of the appellant. The

appellant is not in the mining business. It is a national bank. The inequity of allowing McLure to sit by for five years without proceeding to satisfy his judgment out of the property attached, in view of the palpable injustice to other creditors and the minority stockholders of the debtor company, and under the conditions and circumstances disclosed in appellant's bill, is too glaring to require extended comment. Any one living in a mining country can readily appreciate the disastrous effect upon all mining enterprises by such a course of conduct as is here complained of. If a creditor, and particularly a bank, to which mining companies must necessarily look for temporary assistance in an emergency, as appears in this case, are to be denied relief on such a state of facts as are here brought before the court, no credit can be safely given to any mining enterprise, no matter how deserving.

V.

This action is not barred by appellant's laches. The citation and discussion of a multitude of cases upon this question of laches becomes unnecessary, in view of the principle laid down so clearly and succinctly by this Court in the recent case of London & San Francisco Bank v. Dexter, Horton & Co., 126 Fed. 593. The principle to be applied is thus stated by this Court:

"No hard and fast rule has been laid down by the courts which can be said to cover all cases wherein the defense of laches is invoked. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases

involving the defense of laches, however, and that is that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties, occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced." Citing:

Galliher v. Cadwell, 145 U. S. 368; 36 L. Ed. 738.

Halstead v. Grinnan, 152 U. S. 412; 38 L. Ed. 495.

Wheeling Bridge & T. Co. v. Ryman Brg. Co., 90 Fed. 189; 32 C. C. A. 571.

This Court also quotes from DeMuth v. Bank, 85 Md. 326; 60 A. S. R. 322, as follows:

"Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. There must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine of laches can be successfully invoked."

We might also add the following to the citations supporting the proposition as above stated by this Court:

Bartlett v. Ambrose, 78 Fed. 841; 24 C. C. A. 397.

Hammond v. Hawkins, 143 U. S. 224; 36 L. Ed. 145.

Townsend v. Vanderwerker, 160 U. S. 171; 40 L. Ed. 387.

McIntyre v. Prior, 173 U. S. 59; 43 L. Ed. 606.

O'Brien v. Wheelock, 184 U. S. 450; 46 L. Ed. 656.

Cahill v. Superior Court (Cal.), 78 Pac. 467.

Turpin v. Dennis (Ill.), 28 N. E. 1066.

Tynan v. Warren (N. J. Chan.), 31 Atl. 600.

Parker v. Bethel Hotel Co. (Tenn.), 34 S. W. 209; 31 L. R. A. 713.

16 Cyc. 152-3.

Adopting the language of this Court in London & San Francisco Bank v. Dexter, Horton & Co., supra, we may ask: "Applying this definition and the principle above stated to the case at bar, what duty has the appellant failed to perform? Wherein has the delay caused any prejudice to the appellee? What change in the condition or relations of the parties to the suit has occurred during the period of alleged delay which would now make it inequitable to permit the maintenance of this action? Was there such a delay as, under the circumstances, could be deemed abandonment of the appellant's rights?"

Answering the first question, we say that there was no duty that the appellant failed to perform. After effecting its attachment and procuring judgment, it was not, under the circumstances, obliged to proceed to sale or do anything further, and, in fact, McLure had, by his own acts in attaching and taking judgment in the Federal Court, virtually tied appellant's hands so that it could do nothing. At the time of these attachments the property attached was worth a sum greatly exceeding the two judgments combined, so that if McLure had proceeded to sale with reasonable diligence both judgment creditors could probably have been satisfied out of the property without the necessity of asking the Circuit Court to determine the priority of the attachment liens. Appellant was clearly under no obligation to McLure in any way, shape or form, and, indeed, it would have had

no right to ask aid from the court until it could show that its rights were prejudiced or seriously threatened by McLure's acts.

Answering the second and third questions as above, we say most emphatically that appellant's delay has caused no prejudice to appellee and that there has been no change in the condition or relations of the property or parties to the suit during the period of alleged delay on appellant's part which would now make it inequitable to permit the maintenance of this action. Paragraph 13 of the bill of complaint (Tr. p. 30) expressly avers that no such change has taken place. Without this averment, however, the nature of the proceeding itself would almost necessarily preclude this. Charles D. McLure is alive and personally before this Court, and the contentions which we have urged on appellant's behalf are of such a nature that the facts and circumstances with reference to them are easily accessible to both sides. The very nature of this case is such that the delay, if it be deemed such, in bringing this action cannot possibly make it inequitable to grant appellant now the relief to which it might have been entitled if suit had been commenced at an earlier date. The appellant has done nothing to mislead McLure in any respect. It has not caused him to expend any money in improvements, or to do anything that he did not choose to do. It is true that, according to the bill of complaint, the property has depreciated in value, so that it is now worth no more than enough to satisfy McLure's judgment. This, however, is not any fault of the appellant, but is a condition that has been brought about by McLure himself. This is a change that is prejudicial to the complainant, for

which McLure, by his own negligence and laches, is alone responsible, and of which we are now complaining.

Answering the fourth question, we say again most positively that the delay in commencing this proceeding cannot be deemed an abandonment of appellants's rights. The appellee cannot urge that our delay is abandonment without confessing that his delay is also an abandonment, and which is one of the grounds of this action. McLure, however, was free to proceed to a sale of the property whenever he chose to do so, and abandonment can therefore be properly charged against him, but, under the decisions cited by us in the first subdivision of our brief, the appellant could do nothing further than to make the levies which it did. Appellant did nothing to indicate any intention to release or abandon its attachment, or to cause appellees to believe that such was its intention.

Even were the two actions in the same court, and even were there no question as to priority, there would be ample excuse for delay by the later attachment creditor, while the same delay on the part of the prior attaching creditor would be inexcusable and would amount to abandonment. There is clearly nothing in this case that puts the appellees in a position to successfully invoke the doctrine of laches upon any of the grounds mentioned by this Court and the other courts in the decisions above cited. There is certainly nothing that the appellant has done, or failed to do, that would amount to an equitable estoppel. There is nothing that the appellant has done or failed to do which would warrant a court in now saying that to grant the appellant the relief asked for at this time would be doing injustice to the appellees.

We submit that we are correct in this, even if the bill of complaint set forth no reasons whatsoever why appellant had not instituted this action at an earlier date, and the decision of this Court above cited would be sufficient authority for this statement.

Apellant has, however, in an abundance of caution, and so that the Court may fully understand appellant's position on this matter, set forth in paragraph 13 of its bill (Tr. p. 30) the following facts: That the defendant, McLure, beginning in March, 1902, and ending in April, 1906, was making payments to the State Bank of Neihart upon a loan made by said bank under the same circumstances and conditions, and for the same purpose, as the loan made by the complainant; that McLure also, in the year 1905, paid several claims against the Diamond R Mining Company; that complainant was informed of the facts with reference to the payment of the money to the Bank of Neihart, and of the other claims, and by reason thereof, when taken in connection with McLure's promise to pay complainant the money due it, complainant was led to believe that McLure would pay its debt and waited for him to do so; that in 1905 parties representing McLure came to complainant and stated that there would be an adjustment of the affairs of the company, including complainant's debt; that McLure was without the State of Montana all the times mentioned, and complainant therefore waited for him to come to Montana to pay its said debt as he had agreed, and also, as the controlling stockholder of the company, to call a meeting of the stockholders to see what could be done to protect their interests; that McLure did not come to Montana until the latter part of 1905, or come at all to

Great Falls, the office of the company, or undertake in any way to adjust the affairs of the company or complainant's debt; that complainant desired to give McLure, as well as said company, reasonable time and opportunity to adjust said indebtedness before instituting further proceedings, knowing at all times that complainant's delay was in no manner prejudicial to McLure or the company, and complainant alleges that no changes have taken place or circumstances arisen that would make it inequitable to recognize at this time the rights of complainant as herein set forth, or that would prevent said parties meeting the issues raised as fully as though said action had been commenced at an earlier date.

In addition to the foregoing, we again call the Court's attention to the redemption by McLure of a part of the concentrator from the Bartlett sale, such redemption being made on March 23rd, 1905, and sheriff's deed issued on January 2nd, 1906. This is important to consider in connection with McLure's promises to adjust the affairs of the company and to pay complainant. Until McLure took a deed to this part of the concentrator for himself, appellant was, under all the circumstances, justified in believing that the company's affairs would be straightened out, and that the appellant would get its money. Until McLure took this deed, the company's whole plant was kept intact, and it was this attempted segregation of the plant that operated so much to depreciate its value and to jeopardize appellant's claim. While courts of equity require diligence in the commencement and prosecution of actions, they certainly do not encourage needless litigation. A party seeking equitable relief

ought to be commended for waiting until such time has arrived as to show the necessity for it, instead of being turned out of court because he has not been hasty. The appellant certainly acted within a reasonable time after McLure had taken the sheriff's deed, and after giving McLure reasonable opportunity to keep the promise he had made.

In this connection, too, we take the position with all confidence that McLure is estopped from invoking the doctrine of laches, no matter how long appellant might have waited before commencing action. McLure had personally promised to pay the appellant. The appellant would not have advanced the money to the company without this assurance. It therefore does not lie in McLure's mouth to say that the appellant ought to have proceeded with more diligence in asserting a right to a first and prior lien upon the company's property. He is equitably estopped, in view of his promises, the first being made in 1900 and the last in 1905, from complaining of any delay on appellant's part, as well as equitably estopped from claiming to have a lien on the property in preference to appellant.

Our own view is that appellant could have waited until after the sale, or even after the execution of a deed, providing in the meantime no third party had purchased the property for value without notice and there had been no substantial expenditures made in the way of improvements or developments. Appellant has, however, commenced this proceeding before the marshal's sale, out of an abundance of caution, before the rights of third parties could possibly intervene or any material change could take place with reference to the property.

We confidently submit to the Court that there is absolutely no merit in the contention of appellees that this action is barred by laches on appellant's part.

The suggestion of counsel for appellees that this action does not lie, because of the allegation with reference to the promise on the part of McLure to pay the appellant, is also devoid of merit. Holding, as appellant does, an attachment and judgment against the Diamond R Mining Company, whose validity is unquestioned, the appellant clearly has a right to enforce satisfaction of its claim out of the property attached. Whether McLure was in any way liable also on this obligation could not operate to prevent appellant from enforcing its rights fully against the company.

We quote from Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312; 39 L. Ed. page 716: "Are creditors who are neither stockholders or directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the endorsement of one of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything?"

The foregoing decision is not only authority for the maintenance of this action, regardless of whether the appellee McLure may also be liable to appellant, but is also authority for allowing appellant a prior lien by virtue of its attachment.

CONCLUSION.

We respectfully submit to the Court that appellant has, in its bill of complaint, set forth facts showing that the prior lien claimed by the appellee McLure under his attachment proceedings in the Circuit Court should be set aside and held for naught; that the sheriff's deed to McLure of January 2nd, 1906, covering the portion of the concentrator redeemed by him from sheriff's sale, should likewise be declared void and of no effect; that the appellees should be enjoined from selling or disposing of the property mentioned or acquiring any rights thereto by virtue of any sale thereof under the judgment of said appellee McLure; that the appellant, by virtue of its attachment on all of said property at the time of the commencement of its suit in the state court, and by virtue of its renewed attachment upon the personal property on the 12th day of January, 1907, had and still has a first and prior lien upon all of said property, and that appellant should have the permission of the Circuit Court to proceed under writ of execution on its said judgment to sell all of said property, or so much thereof as may be necessary to satisfy its said judgment.

It is respectfully submitted that the order of the Circuit Court sustaining the demurrer of appellees to appellant's bill of complaint, and the decree of said Court finally dismissing said bill, should be reversed.

A. C. GORMLEY,

Solicitor and Counsel for Appellant.

NO. 1496

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R. MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana.

Appellees.

APPELLEE'S BRIEF.

IRA T. WIGHT,

Solicitor and Counsel for Appellees.

Naegele Printing Co., Helena, Mont.

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Appellees.

APPELLEE'S BRIEF.

May it please the Court:

This is a suit in which complainant below (appellant here) seeks to enjoin the collection of a judgment at law; or, at all events, secure some sort of a decree whereby the junior judgment of appellant may take precedence over Appellee Charles D. McLure's senior judgment in the order of satisfaction out of the assets

of the common debtor, the Diamond R. Mining Company.

The complaint contains no positive averment of any special ground upon which this extraordinary jurisdiction of the Equity Court is invoked, but the recitals are freely emphasized with the adverbs "fraudulently," "collusively," and the like, so that it would appear that the jurisdiction is based upon alleged "fraud."

In any proceeding of this character, where the solemn judgment of a Court of law is attacked, it is elementary that every presumption is in favor of the regularity and validity of the judgment.

Judgments of the Courts are not trivial matters, to be flitted about at will, but are the quality and stability of our entire legal jurisprudence. Adjudications of the Courts therefore, evidenced by final judgments, will not be disturbed unless a most deplorable state of affairs be disclosed, and even then, Equity will refuse to interfere where the bill fails to disclose either or any of the equitable requisites hereinafter specified.

> "On a Bill in Equity against a judgment at law, presumptions will be indulged in favor of the jurisdiction of the Court; the regularity of its proceedings and the validity of the judgment."
>
> 23 CYC. 1047.

The bill does not contain an allegation or a suggestion that appellant did not have full and complete knowledge of all the facts alleged therein, ever since

the commencement of the original action on December 14, 1901, over five years ago; the bill contains no excuse of any kind for the delay of five years in presenting these alleged fraudulent transactions to the Court; the complaint contains no suggestion of any good or meritorious defense to the cause of action upon which the judgment now sought to be set aside, was rendered. The complaint alleges the consideration failed because Charles D. McLure promised to consolidate with the Diamond R. Mines, the Broadwater Group and failed to do so. What sort of arrangement this was to be, or whether such an agreement was in writing as required by the laws of this state, the bill fails to disclose. We have the pleader's conclusion that there was a failure of consideration, whereas the bill on its face shows: "that the said Charles D. McLure was the only other large creditor of the defendant company" (Trans. p. 11) and again: "proceeded to enlarge said concentrator so as to make the same have a capacity of three hundred tons of ore daily, and which was done at an additional cost and expense of about one hundred thousand ($100,-000.00) dollars (most of which was advanced by said Charles D. McLure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action)." (Trans. p. 12). The bill does not contain a suggestion that every cent covered by the judgment was not for money actually loaned to the defendant company.

Paragraph six (6) of the bill (Trans. p. 9) alleges a promise on the part of Appellee McLure to stand surety for the Company in the payment of Appellant's claim. This, however, is no ground for setting aside a judgment at law. If the appellent has any such agreement, then it has a plain, speedy and adequate remedy at law against said appellee as surety upon said debt, and the very fact any such agreement existed would preclude there being any jurisdiction in Equity of this suit. No allegation of any insolvency is contained in the bill, and we contend that by this allegation alone, appellant has pleaded itself out of court.

BRIEF AND ARGUMENT.

I.

JURISDICTION.

This is not a suit in equity ancillary, or brought in aid of any action at law in the Federal Court. The complaint on its face shows this to be an original suit in equity, brought for the purpose of setting aside a judgment at law, previously rendered in the Federal Court, in an action in which the complainant below (appellant here) was not a party.

No suggestion of a federal question can be found in the complaint.

The complaint affirmatively shows the lack of diversity of citizenship.

The complaint contains no jurisdictional clause, nor any allegation showing how the federal court secures jurisdiction of this suit.

There is no direct allegation in the complaint that the amount in controversy exceeds the sum of $2,000.

II.

APPELLEE CHARLES D. McLURE'S LIEN.

Counsel for appellant cites numerous authorities holding that a director of a corporation cannot exercise his office to the giving preference of his own claim over the claims of others against the corporation.

Vol. 5, Thompson on Corporations, Secs. 6492, 6503, 6504 and 6508 all deal with the power of directors of a corporation to "prefer themselves as creditors in respect of debts previously contracted over other general creditors."

Vol. 5, Thompson on Corporations, Sec 6506, announces the doctrine that such directors cannot prefer their relatives.

The cases cited by appellant are to the same effect. All of these are entirely inapplicable here, for the following reasons:

1st: Appellee Charles D. McLure, was not a director or officer of the corporation.

2nd: The directors never made any preference in favor of anybody.

3rd: The complaint shows that Appellee McLure secured his lien by due process of law.

4th: No fraudulent act is charged in said complaint. (See Subdivision V. of this brief, hereinafter contained.)

5th: A judgment at law will not be set aside by a court of equity to allow such a claim to be interposed long after the judgment has become final. (See Sub. VI of this brief, hereinafter contained.)

6th: The complaint contains no sufficient excuse for appellant's failure to litigate such claim, prior to the rendition of judgment in the original action at law.

7th: Appellant is barred by its laches in allowing five years to pass before setting up such claim. (See Sub. VI of this brief, hereinafter contained.)

III.

THERE IS NO SUFFICIENT ALLEGATION THAT THE LIEN OF APPELLEE CHARLES D. McLURE WAS MADE TO HINDER, DELAY OR DEFRAUD.

The complaint alleges that the lien of said appellee was not made in good faith, but was made for the purpose of hindering, delaying and defrauding the appellant.

Fraud cannot be alleged in any such manner as

this. (See Sub. V. of this brief hereinafter contained.) The complaint contains no statement of facts whatever disclosing to the court wherein or how said appellee's lien was for the purpose of hindering, delaying or defrauding appellant. An attachment is always for the purpose of securing a lien upon the property attached, and to hold the same for the payment of a certain indebtedness. The complaint does not even allege that the attachment was not put upon the property to secure the payment of a good, valid existing claim. Courts of equity do not set aside the due process of courts of law, upon the mere statement of a legal conclusion in a complaint.

This point is also subject to the same objections enumerated above in Sub. II hereof.

IV.

ALLEGED DELAY IN ISSUANCE OF EXECUTION.

Counsel for appellant cites several cases upon the question of reasonable time for the issuance and levy of an execution under a judgment at law. The judgment attacked in this suit was a judgment at law, rendered by the federal court. No citation of authority is necessary upon the proposition that in a law case the federal court in Montana follows the Montana Statutes.

Appellant's authorities upon the general rule, are

inapplicable in Montana, for the time for issuance and levy of execution in this state is fixed by statute.

Sec. 1210 of the Code of Civil Procedure "The party in whose favor judgment is given may, at any time within six years, after the entry thereof, have a writ of execution issued for its enforcement."

This provision of the Code would be of little benefit to a party if before the time which the statute allows had expired a third party can base his right to set aside the judgment upon the ground that the plaintiff therein took the time which the law allows to issue his execution, and for that reason the rights which have been decreed him may be taken away.

If appellant desired to contest the priority of the claims it has shown no reason why it did not intervene in the original case at the proper time, and have that question determined. On the contrary, however, it took no steps to intervene but proceeded with its action in the State Court and took out a judgment in the State Court. Its action was commenced in the State Court just three days after the action was instituted in the United States Court, and something like a month before the judgment in the United States Court was rendered. (See Trans. pp. 5-7.)

Now we ask in all fairness, can a party who has full knowledge of the facts and an opportunity to come in and be heard, and who fails to do so, wait until five years after final judgment and then come in to a court

of Equity and ask to have his claim decreed prior to the claim of the plaintiff in that action? The appellant in this case had ample opportunity to elect which course it should pursue; whether to come into the case pending in the Federal Court and litigate the priority of its claim over the claim of the plaintiff therein, or to go ahead with its case in the State Court, and it did elect to proceed with its case in the District Court. Now, when it finds that the judgment of the United States Court and the attachment of the United States Court is prior to the liens which it secured in the State Court it asks this Court for leave to come in at this late day.

How is appellant injured by said appellee's delay in issuing execution? If it was in fact injured by reason of said appellee's exercising a legal right, granted to him by the laws of Montana, it certainly cannot base any action upon appellee's exercising a legal right. But, wherein does an injury lie? It alleges the delay has been collusive and for the purpose of cheating and defrauding the appellant, but neither in the bill nor in its brief does it make it clear how this could be. The theory of injury by reason of appellee's delaying the issuance of execution must be, that if appellee had proceeded to sell the property, the appellant would then have had the statutory time within which to redeem the same, by paying the amount of appellee's judgment. If this is the foundation of the injury claimed by appellant, such a claim is, in view of the

statutory provisions in this State, certainly absurd. The Bill alleges that appellee has been holding this property, and that it has been depreciating in value. The matter of fact is, the appellant has been in a position to redeem the property from appellee's judgment at any time since that judgment was rendered. The only effect of appellee's not levying execution immediately has been to give appellant five years within which to redeem instead of one. It has never been tied down a moment. It can redeem today if it so desires. Section 3781 of our Code of Civil Procedure protects a subsequent lienor from any damage by his prior lienor. If he feels that the property is depreciating or that it is necessary to make a sale at once in order to protect his second lien, the prior lienor cannot stop him. All he need to do is to redeem the prior lien, and the law subrogates him to all the benefits of the superior lien.

> "Sec. 3781: One who has a lien, inferior to another, upon the same property, has a right:
>
> 1. To redeem the property in the same manner as its owner might from the superior lien; and,
>
> 2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

The fact is the appellant does not want to redeem, and never did and never will. The sum and substance

of its effort is to secure priority over appellee's judgment, and as a cover for its five years laches in seeking so to do it tries to set up that in some unaccountable way it is injured because appellee has taken the time allowed him by law to issue his execution. If we are to understand appellant has been pining for an opportunity to redeem, we would suggest that inasmuch as its bill is of an equitable character, that it would have been proper for it to have made a tender of the amount of our judgment.

If for any reason the plaintiff in the original case felt that it was not to his advantage to issue execution and make a sale of that property during a period when he felt that conditions were not favorable to a sale, we certainly feel that he was entitled to take the time the laws of the State give him within which to satisfy his judgment. When the Court considers this period of delay we cannot but believe that the Court will see far more to criticise in the delay on the part of appellant itself than in the delay on the part of plaintiff in the original suit.

If the appellant claims priority it is certainly a strange time for it to come in with its allegations of fraud, collusion and conspiracy for the purpose of establishing its priority. On the appellee's part the delay in issuing execution is in conformity to a legal right which the statutes of this State give him, and on the appellant's part the delay in filing this bill is in con-

formity to no provision of law that we can find.

It may be granted that in the absence of express statutory regulation, the general rule is that it is the duty of a judgment creditor to use reasonable dispatch in levying upon personal property attached; but where the statute fixes a period during which at any time execution may issue, the law has thus fixed the limits of what is reasonable time, and the courts will not curtail it.

As Chief Justice Marshall said in Rankin et al vs. Scott, 12 Wheat. 179, the circumstances of not proceeding upon the elder judgment, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien.

In Mosely vs. Edwards, 2 Florida 429, there is an elaborate and learned discussion of the effect of delay in suing out execution upon the lien of a judgment, the court holding that such lien is not lost by mere delay, and approving the doctrine laid down by Chief Justice Marshall in Rakin et al vs. Scott, supra.

In Speelman vs. Chafee, 5 Colorado 247, the court held that when in a suit in attachment, the plaintiff obtains a judgment, which, by existing law, is a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is maintained and enforced under the judgment by virtue of the execution issued thereon. In discussing

what was a reasonable time within which the judgment creditor should levy his writ of execution, the court said that they had found no decision fixing a period outside of statutory rule.

In the later case of Floyd vs. Sellers (Colorado) 44 Pacific 373, it was expressly held that there is no reason why a greater degree of diligence should be exacted from a judgment creditor, whose only lien is that of his attachment, than is required by the statute in the enforcement of the lien of a judgment. The Court said: "In the latter case six years are allowed, and we can perceive no distinction between the two classes of liens, which would make a shorter time negligence where the lien is that of an attachment and not of a judgment." The Colorado statute originally required that execution should be issued within one year, but after the decision in Speelman vs. Chafee, supra, the law of the state was changed and the lien of a judgment was made to continue for six years, whether an execution be issued or not; and the court affirmed the view that the statute is a proper guide in determining the question of diligence upon the part of an attaching creditor in enforcing after judgment the lien of his attachment.

See also, Lant vs. Mauley, 75 Fed. 627.

Second Freeman on Judgments, Sec. 377, 391-A, 339;

Watkins vs. Wassele, 15 Arkansas 73;

Devendall vs. Doe, 27 Alabama 156;

23 Cyc., P. 1399.

V.

NO PROPER ALLEGATION OF FRAUD.

The bill of complaint in this case utterly fails to make any allegations of fraud which would justify a Court of equity in setting aside a judgment at law. The complaint charges that process was served upon the brother of this defendant, but the complaint also shows that such brother was the proper person upon whom service should be made. The complaint alleges that said brother allowed this defendant to take judgment by default. Despite complainant's repeated use of the words "collusively" and "fraudulently," there is in fact no fraud to be presumed because no defense was interposed, where the bill fails to disclose that any defense to the claim existed; nay, even further, where the bill affirmatively does disclose that the action was based upon notes, for which a full and valuable consideration in current coin of the realm had been paid.

> Dinger v. Receiver of Erie Ry. (N. J.) 8 Atl., 811: "There can be no doubt that the first ground stated in the bill imputes to the defendant in this action a fraud of the most iniquitous character.

He is charged with both corruption and forgery. The allegation of the bill is that the defendant, by corrupt means, procured an employe of the complainant to alter a book, after it had been put in evidence, so as to make it furnish forged evidence of fraud. Now, while I think it would be difficult to imagine anything more detestable in the way of fradulent conduct, or more dangerous to the safe administration of justice, than the fraud here charged, still I also think it must be admitted that this Court is powerless to do anything by way of correction, punishment, or redress of such fraud in this case, unless it is clearly shown that the decree assailed is the product of such fraud, and has no other foundation. A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud; but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree has no other foundation than fraud. In other words, it must be made to appear that, if there had been no fraud, there would have been no judgment or decree. An attempt to exercise a wider or more liberal jurisdiction in cases of this class would, it will be perceived, necessarily enlarge the jurisdiction of Courts of Equity so as to make them practically courts for the review of the judicial acts of other tribunals, and not tribunals with just sufficient power to redress frauds by undoing what fraud has done.

Mr. Wills, in his treatise on Res Adjudicata, (page 499) states the rule on this subject as follows: "Fraud vitiates everything, and a judgment equally with a contract,—that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in

general, equity will not go again into the merits of action, even for the purpose of detecting and annuling fraud."

Is there anything contained in the bill under consideration whereby it is "made to appear that, if there had been no fraud there would have been no judgment or decree?" Careful scrutiny has failed to reveal any such allegation to us.

Ross vs. Wood, 70 N. Y. 9.

Heller vs. Dyerville Mnfg. Co. (Cal.) 47 Pac. 1016: "There is therefore nothing in the facts alleged to sustain the general averments of a fraudulent purpose in the manner of procuring the decree; and such general averments, standing alone, and unaccompanied by facts which in themselves disclose fraud, are insufficient to give the transaction even a colorable aspect of that nature. Such general averments are to be regarded as merely the conclusions of the pleader, embracing no issuable character, and not the averment of substantive facts, which are admitted by the demurrer. As said by the Supreme Court of the United States in passing upon the sufficiency of a Bill of similar construction: 'It is full of the words 'Fraudulent' and 'corrupt' and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisprudence, unless the transactions to which they refer are such as, in their essential nature, constitute a fraud or a breach of trust for which a Court of Chancery can give relief.'"

Ohio & W, M. & F. Co., vs. Carter (Kansas) 58 Pac. 1040: "The petition complained of set forth. Held, that the demurrer thereto should have been sustained.

"When fraud practiced by the successful party is alleged the facts showing such fraud must be stated or set forth in a plain and concise manner, as in other cases. Mere knowledge of certain facts is not sufficient. The fraudulent acts and proceedings of such parties designed and practiced for the purpose of securing an unfair and unjust judgment, must be clearly shown."

United States vs. Throckmorton, 98 U. S. 61; 25 L. Ed. 93: "Fraud vitiates everything, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the Court will not go again into the merits of an action for the purpose of detecting and annulling the Fraud. * * * * Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent."

United States vs. Atherson, 102 U. S. 372; 26 L. Ed. 213: "A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it and the manner in which

the Court or the party injured was misled or imposed upon."

"A court of equity upon a proper application will relieve against or enjoin a party from enforcing a judgment which he has obtained by means of fraud. The term "fraud" as here used is to be taken in its common and direct sense and means the perpetration of an intentional wrong, or the breach of a duty growing out of a fiduciary relation. To obtain relief on this ground it is necessary that the fraud charged schould be clearly stated and proved, and it must appear that the fraud was practiced or participated in by the judgment creditor, that it was actually effective in bringing about the judgment which was rendered; that the complainant in equity has a good defense to the action on the merits and has no other adequate means of obtaining relief against the judgment or avoiding its consequences, and that his situation is in no way due to his own negligence or lack of proper diligence."

23 Cyc. 1022.

VI.

LACHES.

"The complainant in a suit in equity for relief against a judgment at law must exonerate himself; that is, his bill must contain proper averments to show that the judgment against him was not attributable to his own negligence or fault, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence."

23 Cyc. 1042.

"But the mere loss of a legal remedy is no ground for equity to interfere unless it is also shown that there is equitable grounds of objection to the judgment as it stands; and relief will in no case be granted where the loss of the remedy at law was due to the party's own negligence or fault or that of his counsel."

23 Cyc. 985.

Rio Grande etc., vs. Gildersleeve, 174 U. S. 603: "We are also of opinion that the general current of authority in the Courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised we have shown that a court of equity, on the most formal proceedings, taken in due time, could not, according to its established principles, have granted the relief which was prayed for in this case. It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief."

"One who desires to invoke the assistance of equity as against a judgment at law must act with reasonable promptness and relief will not be granted to a complainant who has delayed his application to equity, without adequate excuse, for such a considerable period of time as to be chargeable with laches."

23 Cyc. 1046.

Adams School Tp. vs. Irwin, (Ind.) 49 N. E. 806: "Equity, however will not interpose to relieve a complaining party from a judgment at law on the grounds that he had a valid defense to the action wherein the judgment was rendered, which was not interposed by reason of his own negligence. As a general rule, every person is required to look after his own rights, and to see that they are vindicated in due season and in proper manner. Consequently where a defendant has a proper means of a defense in his power, but neglects or fails to employ such means in a proper tribunal, and suffers a judgment to be recovered against him in a proper tribunal, he is forever precluded. Center Tp. vs. Board of Com'rs of Marion Co., 110 Ind., 579, 10 N. E. 291, and authorities there cited. The fraud that will annul or vacate a judgment is not that arising out of the facts which were actually or necessarily in issue in the cause in which it was rendered. The rule is that the fraud which vitiates a judgment must arise out of the acts of the prevailing party, by which his adversary has been prevented from presenting the merits of his side of the case, or by which the jurisdiction of the court has been imposed upon; or, in other words, the fraud relied on must relate to some act in securing jurisdiction, or as to something done concerning the trial or the judicial proceedings themselves; and the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal controversy arose."

The appellant in the case at bar, had ample opportunity to come in and contest the priorities of claims before the judgment in the original action was

rendered. The bill itself shows that appellant had knowledge of the action not later than Dec. 18th, 1901, when the attachment was levied, and the sheriff of Cascade County was prevented from taking possession under appellant's attachment issued by the State Court. (Trans. p. 8). The judgment was not rendered until the 16th day of January, following. (Trans. p. 6). If appellant claimed any interest in the subject matter of this action, it had a plain, speedy and adequate remedy at law. The original case being an action at law, the Codes of Montana governed the procedure therein.

Sec. 589 of the Code of Civil Procedure provides: "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both."

Appellant therefore had full knowledge, and ample opportunity to contest the priority of appellee's claim, and the validity of the attachment, in the action at law, but instead of doing so, appellant has allowed its opportunity to pass, and now, after sleeping for over five years upon its alleged rights, it seeks to invoke the aid of equity to set this judgment aside.

Miller vs. Miller's Estate, (Neb.) 95 N. W. 1010;

Perkins vs. St. Louis K. & C. Ry., (Mo.) 45 S. W. 260;

Rowlett vs. Williamson, (Tex.) 44 S. W. 624.

Vantilburg vs. Black, 3 Mont. 459: "But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceedings at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief. These views are sustained by many authorities."

Alexander vs. San A. L. Co., (Tex.) 13 S. W. 1025;

Donaldson vs. Roberts, (Ga.) 35 S. E. 277;

Berry vs. Burghard, (Ga.) 36 S. E. 459;

Johnson vs. A. G. & T. Co., 156 U. S. 618; 39 L. Ed. 556;

Abraham vs. Ordway, 158 U. S. 416; 39 L. Ed. 1036: "One of the grounds upon which courts of equity refuse relief where the plaintiff is guilty of laches is the injustice of imposing upon the defendant the necessity of making proof of transactions long past, in order to protect himself in the enjoyment of rights which, during a considerable period, have passed unchallenged by his adversary, with full knowledge of all the circumstances."

This court in Denton vs. Baker, 93 Fed. 46 uses the following language:

"If we were free to decide this cause upon the merits, we would not have the slightest difficulty in holding the claim upon which the judgment here sought to be annulled was entered, as well as the judgment itself, fraudulent and void, as against

the stockholders and creditors of the insolvent bank, and in affirming the decree appealed from. But, unfortunately, through the neglect of the receiver, the rights and interest of those parties appear to be charged with this claim and judgment, without any apparent hope of relief. Certainly, there can be none in the present suit, and for these reasons: Baker became receiver on the 19th day of June, 1895. The Judgment in the action of Denton against the bank was rendered on the 30th day of November, 1895, notice of which judgment the receiver, in his testimony, admits to have received a few days after its rendition. To get rid of that judgment the receiver had the opportunity and the means, by proceedings in the court in which the judgment was rendered. * * * * * * * * * * * "The power of a Court of equity to relieve against a judgment," said the Supreme Court in Brown vs. Buena Vista Co., 95 U. S. 157, 159, "upon the ground of fraud, in a proceeding had directly for that purpose, is well settled; and the power extends, also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief." To the same effect are many decided cases and text writers. We cite a few of them: Knox Co. vs. Harshman, 133 U. S. 152, 10 Sup. Ct. 257; Nongue vs. Clapp, 101 U. S. 551; Graham vs. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009; Furnald vs. Glenn, 56 Fed. 373; Association vs. Loch-

miller, 20 C. C. A. 274, 74 Fed. 23; Ere vs. Hazen, 61 Cal. 360; 1 Black Judgm. (1st. Ed.) 361; Freeman Judgm. Secs. 486, 489, 490, 495; Storry Eq. Jur. Secs. 894, 896.

"Although not made a party to the action brought by Denton in the state court, the right of the receiver, based upon a seasonable application, to appear in that court and contest the validity of the judgment, does not admit of doubt. Bank vs. Colby, 21 Wall. 609; Denton vs. Baker, 24 C. C. A. 476, 79 Fed. 189, 192; Denton vs. Bank (Wash.) 51 Pac. 473. The receiver, therefore, had ample opportunity to take appropriate proceedings in the very action in which the judgment was rendered, to contest its validity on any ground of fraud or irregularity that existed. Instead of resorting to that forum, and while the right to do so still existed, he brought the present suit in the Court below. That a court of equity will not interfere, under such circumstances is thoroughly settled, as will be seen by a reference to the authorities already cited.

Not only did the receiver allow the period prescribed by sections 1393 and 1395 of the Washington Statutes (2 Hill's Ann. Code) to pass without making any motion for the annullment of the judgment, but he made no appearance in that court at all until March 10, 1897, nearly two years after the rendition of the judgment against the bank, at which time he applied to the superior court which gave the judgment, to vacate and set it aside, and to permit him to file an answer and defend as such receiver."

The court will observe that the foregoing case is almost identical with the case at bar. In that case as in

the case at bar, the complainant was not a party to the original action, but there as in this case, had knowledge of the action, and an undoubted right to come into the case if it had seen fit to do so. Having had the knowledge and the opportunity, the Court holds that Equity will not disturb the judgment of the law court, even though the court in the Denton case states that the judgment was undoubtedly obtained fraudulently.

The same matter was also presented to the Supreme Court of Washington (See 51 Pac. 473) and that court said:

> "We do not discover any excusable neglect in the receiver in making this application. On the contrary, a fair inference from all his acts in realtion to the judgment entered is that he had deliberately determined not to make such an application or to appear in the Superior Court, and afterwards changed his intention when the motion to vacate was made. We think from the record presented here, that the order of the Superior Court denying the application to vacate the judgment was correct and it is affirmed."

And so in the case at bar, the appellant in like manner, with full knowledge of all the facts, and with an undoubted right to come in and litigate appellee's claim, deliberately stood by and allowed judgment to be entered, and then took no action whatever for five years thereafter. And even further than this, proceeded with its own claim in another tribunal. (Trans. p. 7.)

Mass. B. L. Assn. vs. Lohmiller, 74 Fed. 23;

"Whenever a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. * * * * * The bill is silent in another respect, of which these principles of equity generally require clear expression before relief can be extended. There is no impeachment of the cause of action upon which the judgment was rendered, nor suggestion of defense in whole or in part."

Pacific R. R. Co. vs. Missouri P. R. R., 12 Fed. 641: "Among these rules are the following: (1) No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit * * * (2) Nor will relief be granted if the complaint might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit."

Roots vs. Cohen (Miss) 12 So. 593;

German Sav. Bnk vs. Des Moines N. B. (Iowa) 98 N. W. 606;

City of Ft. Pierre vs. Hall (S. D.) 104 N. W. 470.

Gray vs. Barton (Mich) 28 N. W. 813:

"Equity relieves against a common-law judgment only upon clear proof of artifice and deceit by the prevailing party against his adversary, and

the injured party must have been diligent in the assertion of his rights."

Proctor vs. Pettit (Neb) 41 N. W. 131:

"It is an elementary principle that courts of equity will not take jurisdiction of causes where the complainant has a complete remedy at law, even though the party complaining may not have availed himself of the remedy, and by laches deprived himself of it."

Long vs. Eisenbeis (Wash) 51 Pac. 1061:

"More than a year elapsed before plaintiffs took any action with reference to the judgment sought to be vacated. * * * No reason is alleged by plaintiffs why application to vacate the judgment in the original action was not seasonably made. It will be found upon an examination of the authorities, that, where such applications to vacate a judgment have been entertained, it has been in those cases where the complainants were without fault or negligence."

Ratliff vs. Stretch (Ind) 30 N. E. 30:

"Equity will not enjoin the enforcement of a decree obtained by fraud, mistake or accident, unless the complainant shows that the same could not have been prevented by the use of reasonable diligence on his part, that the law afforded him no efficient defence against such decree, and that he has been diligent in seeking relief."

Barnett vs. Barnett (Va) 2 S. E. 733:

"Where a bill to enjoin relief against a judgment on a bond, which it was alleged was procured by fraud, was not filed until six years after the perpetration of the fraud, relief was refused on

the ground of unreasonable delay."

Hildreth vs. James (Cal) 41 Pac. 1039:

"The present action was not brought until more than five years after the entry of the judgment sought to be cancelled. A general demurrer to the amended complaint was sustained, and, plaintiffs failing to further amend, judgment was rendered for defendants. Plaintiffs appeal. The demurrer was properly sustained. In the complaint no facts are averred showing any diligence on the part of appellants."

Crim vs. Handley, 94 U. S. 652; 24 L. Ed. 216:

"Courts of equity will not enjoin judgments at law, unless the complainant has an equitable defense to the cause of action, of which he could not avail himself at law because it did not amount to a legal defense; or where he had a good defense at law, of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or his agents. Hendrickson vs. Hinckley, 17 How., 443 (58 U. S. XV., 123)."

Brown vs. County of Buena Vista, 95 U. S., 157; 24 L. Ed. 422;

Graham vs. B. H. & E. R. R. 118 U. S. 161; 30 L. Ed. 196;

McQuiddy vs. Ware, 20 Wall 14; 22 L. Ed. 311.

Cragin vs. Lovell, 109 U. S. 194; 27 L. Ed. 903:

"It is quite clear that the bill in equity was rightly dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared

and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence.

Phillips vs. Negley, 117 U. S. 665; 29 L. Ed. 1013.

Knox Co. vs. Harshman, 133 U. S. 152; 33 L. Ed. 586:

"A court of equity does not interefere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself and agents.

"Equity will refuse to relieve a party against a judgment which results from his own negligence or carelessness in failing to plead or defend the original action, or otherwise to watch over, protect and assert his rights in that proceeding."

23 Cyc. 980.

Appellant places considerable reliance upon the case of London & San F. Bank vs. Dexter H. & Co., 126 Fed. 593. The court will note that there is no similarity between this case and the case at bar, either as to the facts or character of proceeding. We are unable to find in that case the slightest intimation by this court of any retraction by this court of the stringent requirements where a party seeks to envoke equitable jurisdiction to set aside the due process of a court of law.

Appellant urges in its brief that there has been no change in the condition of affairs, yet its complaint al-

leges a great depreciation in the value of the property. (Trans. p. 17 and 18).

VII.

MERITORIOUS DEFENSE.

"A court of equity will not interfere with the enforcement of a judgment recovered at law unless it is unjust and unconscionable; and therefore such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action."

23 Cyc. 1031.

"The bill must also allege and show that the complainant has a good and meritorious defense to the action at law, and it must allege and show this, not merely in general terms but by stating the facts constituting the proposed defense."

23 Cyc. 1039.

In the case at bar the bill fails to state any defense to the original action at law. No facts constituting the proposed defense are set up in the bill, nor is there even a general statement that any defense exists. On the contrary, the bill affirmatively shows that the cause of action upon which the former judgment is based, is certain notes. (Trans. p. 13). No suggestion is made in the bill that the notes were not given for money actually advanced; or that the amount recovered under the judgment in the law action was one cent in excess of the amount actually due appellee at the time the judgment was rendered. On the other

hand, the bill affirmatively alleges that appellee was a "large creditor" (Trans. p. 11) of the defendant Company, and that one hundred thousand dollars was expended upon the premises of the defendant Company "most of which was advanced" by said appellee. (Trans. p. 12). There is not an intimation that this indebtedness had been paid, or that the same was not actually due and owing at the date of the judgment at law.

In view of these facts, the remedy appellant seeks in this case, is certainly of a character calling for an extraordinary exercise of equitable jurisdiction, to say the least. The highest courts of this country express the greatest reluctance in disturbing a judgment at law, and have laid down the rule that such procedure by a court in equity will never be followed, where a good and meritorious defense to the original action fails to appear.

White vs. Crow, 110 U. S. 183; 28 L. Ed. 113:

> "John B. Henslee was the authorized agent of the Company under the laws of Colorado, upon whom service of proceedings against the company could be made; and he was also a large stockholder therein and attended without compensation, to some of the business of the company.
>
> "The company became embarrassed and suits were brought against it by its creditors in January, 1882. It owed Henslee $1,500 for money advanced to it by him. Henslee assigned his claim to the defendant Joseph R. Crow, in part payment

of money due from him to Crow, who brought suit on the claim in the County Court of Lake County, Colorado. The summons was served on Henslee, as state agent, on January 9, 1882, and four days thereafter he appeared in open Court, and, as the record of that case states, as general agent of the company, consented to the submission of the case, and judgment was thereupon rendered against the company in favor of Crow. * * * * * * * * * * While the events above mentioned in reference to this property were happening in Colorado the Supreme Court of the City and County of New York, in a suit therein pending against the company on May 29th, 1882, appointed a receiver, to whom, on October 23, 1882, the company, by order of the Court, conveyed all its property. At a sale made by the receiver about December 1, 1882, the appellant, John E. White became the purchaser of the property of the company in Chaffee County, Colorado, and on December 5th received a deed therefor from the receiver, and on December 6th a deed from the company. At the time of his purchase White knew of the liens against and sales of the property, and that the time for redemption was about to expire. * * * * * * After the time had expired, White offered to redeem from the Crow sale, but the appellees refused to allow the property to be redeemed.

"Thereupon on February 12, 1883, the appellant John E. White, filed the bill in this case to which Hanslee, Crow and the above mentioned purchasers of said judgments, and Robert Ray, the Sheriff of Chaffee County, were made parties. The Bill prayed that Ray, the Sheriff of Chaffee County, might be enjoined from making a deed to the own-

ers of the certificate of sale issued to Joseph R. Crow and that the certificate might be declared null and void and that, upon payment by the complainant, of the amounts found due to Crow on his claim against the property, he might be compelled to execute a deed of release to him for said property.

"The first assignment of error which we shall notice is, that the circuit court erred in not declaring the judgment, recovered by Joseph R. Crow against the Brittenstine Silver Mining Company void; first, because fraudulently obtained; and second, because the court was without jurisdiction to render it.

"We have been unable to find in the record any support for the contention that the judgment was fraudulently obtained. All the alleged facts set out in the bill on which the charge of fraud is based are clearly disproved by the testimony. But if the Brittenstine Silver Mining Company were itself assailing the judgment as fraudulently procured, it could not have enjoined in equity unless it could aver and prove that it had a good defense upon the merits. Hair vs. Lowe, 19 Ala. 224; Pearce vs. Olney, 20 Conn 544; Ableman vs. Roth, 12 Wis. (81) 90. There is no pretense that the Company had any defense. It has never complained of the judgment. On the contrary, it promised to pay it provided execution were stayed, and upon its promise of payment execution was stayed. Much less, therefore, does it lie in the mouth of appellant to complain of fraud in the obtaining of the judgment. On this point he has no standing in Court."

The court will note that in the case above quoted,

the contention is between a senior and junior lienor, the same as it is in the case at bar. But, in the case quoted, the agent for the defendant company went into Court four days after service of process and consented to a judgment against the company, based upon his *own claim.* Yet the Supreme Court of the United States holds that inasmuch as the claim was a valid claim, to which there was no meritorious defense, equity would refuse to set aside the judgment at law.

Newman vs. Taylor (Miss) 13 So. 831:

"The appellee against whom a judgment at law had been rendered without notice, could have secured relief by motion in the law court, upon the trial of which it would only have devolved on him to show that no service of process had been made on him. Meyer vs. Whitehead, 62 Miss. 387. Instead of resorting to the court of law, he has applied to chancery for relief, and, being in a court of equity finds himself subjected to the operation of the equitable maxim that 'he who seeks equity must do equity,' by reason of which it was incumbent upon him to show, not only that the judgment at law was void, but that he has a good defense to the suit."

Janes vs. Howell, (Neb.) 55 N. W. 965:

Chicago & B. Ry. vs. Manning, (Neb) 37 N. W. 462;

Mulvaney vs. Lovejoy, (Kan) 15 Pac. 181;

Hollinger vs. Reeme, (Ind) 24 L. R. A. 46:

"Besides, he was negligent in not bringing the action for relief after the discovery of the judg-

ment until nearly a year after its rendition. It is always necessary, when one seeks to set aside a judgment procured by fraud, to show that there is a meritorious defense to the action in which the judgment was rendered."

Dorwart vs. Troyer (Neb) 96 N. W. 116:

"It seems to be the settled law of this state that equity will not relieve against a judgment at law unless the complainant both pleads and proves a defense thereto upon the merits, nor in any case in which he has had knowledge or notice of the pendency of the action in time to make his defense therein, and has negligently omitted so to do."

Woodward vs. Pike (Neb) 62 N. W. 230;

Wilson vs. Shipman (Neb) 52 N. W. 577;

Wilkins vs. Rewey (Wis) 18 N. W. 513;

Moore vs. Hill (Ark) 8 S. W. 401;

McBride vs. Wakefield, 78 N. W. 713.

Hendrickson vs. Hinckley, 58 U. S. 443; 15 L. Ed. 123:

"The object of the Bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

"A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

Becker vs. Huthsteiner (Ind) 41 N. W. 323:

"Conceeding, without deciding, that the allegations in the complaint sufficiently sustain appellant in this action in her failure to appear to the action in question, upon the ground of excusable neglect, this alone, however, is not sufficient to entitle her to the relief sought by her complaint. She was also required, under the rule firmly settled by repeated decisions of this court, to further show by her pleading that she had a specific, pertinent, and good defense thereto."

Opie vs. Clancy, (R. I.) 60 Atl. 635;

Roberts vs. Moore, (Ga.) 38 S. E. 402;

Petelka vs. Fitle, 51 N. W. 131.

Eldred vs. White (Cal) 36 Pac. 944:

"It is not enough to aver that plaintiff stated the facts of the former case to certain attorneys, and was by them advised that he has a good defense, without averring that he has such a defense, and setting out the facts constituting it."

Meinert vs. Harder (Ore) 65 Pac. 1056:

"The plaintiff having failed to allege a meritorious defense, or "that his plight is in no wise attributable to his own neglect,." the decree is reversed and remanded for such further proceedings as may be necessary and proper, not inconsistent with this opinion."

Rotan vs. Springer (Ark) 12 S. W. 156:

"The plaintiffs offerred no suggestion of a defense to the claim upon which the judgment which they sought to enjoin was based. Their complaint, therefore, stated no cause of action, (State vs. Hill, 50 Ark. 458, 8 S. W. Rep. 401) and

the court did not err in sustaining the demurrer. Affirm."

Hayes vs. U. S. P. Co., (N. J.) 55 Atl. 84:

Brick vs. Burr (N. J.) 19 Atl. 842:

Osborne vs. Gehr, 46 N. W. 84:

Black on Judgments, Sec. 365; 366:

Black on Judgments, Sec. 368:

"And further, in order to obtain equitable relief against a judgment on the ground of fraud, it is necessary to be alleged and shown that there is a good defense on the merits. Or, as otherwise stated, it must be made clearly to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment."

Black on Judgments, Sec. 378:

Fickes vs. Vick, 69 N. W. 951:

Turning back to the allegations of the Bill, wherein is any Equity whatever disclosed?

The first suggestion of any fraud contained in the Bill is in paragraph four (Trans. p. 5) wherein the complaint alleges that the judgment was obtained against the company by default; that summons was served upon L. S. McLure as President of the Company, and that said L. S. McLure made no defense to the original action. The bill, however, utterly fails to show that there was any defense which said L. S. McLure could have interposed. Moreover, we desire to call the Court's attention to the fact that the appellant

herein very carefully refrains from stating in what manner appellant's judgment was obtained, and even fails to state the date when its judgment was rendered. The reason why the complaint fails to disclose the date and manner in which appellant obtained judgment against the defendant company is, of course, apparent. If the appellant in this suit should disclose the fact upon the face of its bill, that its judgment also was secured by default it would necessarily weaken its allegation that our judgment was fraudulent because said L. S. McLure allowed the same to be taken by default. A party seeking to invoke equitable jurisdiction to the extraordinary extent which is demanded in this suit, should be held to the strictest of good faith, and evasions in its own bill should be viewed by a Court of Equity in applications of this kind with grave suspicion. Evasions are always odius to equity, and especially so where the pleader very carefully refrains from disclosing whether or not the identical situation which he alleges to be fraudulent as against the defendant, exists in his own case. We merely call attention to this feature for the purpose of questioning that degree of good faith which a litigant must disclose in seeking to invoke the jurisdiction which is sought in this case, and not because we feel that there is any merit whatever in the allegation concerning the entry of the judgment by default. The Court cannot presume that because a judgment is entered by default that such judg-

ment is fraudulent. The bill cannot merely allege that the default judgment was fraudulent. There is no fact alleged in the bill from which this Court could conclude that a single cent covered by that judgment was not due and owing for moneys actually advanced. The appellant does not even pretend to allege that every cent covered by the judgment was not loaned to the defendant company, but on the contrary, the Bill does show that appellee had advanced a large sum of money to the defendant company. (Trans. p. 12.)

The second purported fraud which the Bill alleges is that appellee McLure promised to consolidate the Broadwater Group of Mines with the mines of the Diamond R. Mining Company, and failed to do so. (Trans. p. 13). If any valid contract of this character exists the Court will readily see that there is no grounds of bringing the same into this suit. The Courts are open to the parties to compel a specific performance of that contract, (if any such contract exists.) There is not the slightest necessity of setting aside a judgment at law rendered over five years ago for money which appellee loaned to the Diamond R. Mining Company, upon any such grounds as this. Moreover, the complaint fails to show what the nature of this alleged promise was; whether appellee promised to make the Diamond R. Mining Company a present of the Broadwater group of mines; whether there were any conditions precedent which the Diamond R. Min-

ing Company was to perform, or in fact anything at all in relation to this matter. The bill alleges the legal conclusion that the consideration for the notes upon which this appellee's judgment was based, failed because appellee did not convey to the Diamond R. Company the Broadwater Group of Mines, and yet the Bill affirmatively shows that appellee advanced the cash for which said notes were given, to the Diamond R. Company, and there is not a suggestion that he did not, in fact, advance and loan to the company every dollar for which he obtained judgment.

The next allegation of the Bill is that through the fraud and conspiracy of appellee and L. S. McLure, that appellee McLure made a contract with the Diamond R. Company to treat the ores of the Broadwater Mines at 75c per ton which was at a loss to the Diamond R. Company. (Tras. p. 13). If this allegation is true, there is no reason why an action cannot be maintained to rectify this matter. The only possible effect it could have in any of the matters now under consideration is that it could possibly have been set up as a counter-claim in the original action. But there is no showing upon the face of the Bill upon which this Court can base any conclusion whatever. The Bill fails to show whether there was one ton or a thousand tons run through this concentrator, or whether the Diamond R. Company suffered a loss of one dollar or a thousand. This Court cannot set aside a judgment

at law upon the bare allegation that the company has suffered a loss because of some entirely independent contract, and especially where no intimation is given as to what this loss might have been. This matter is, however, entirely foreign and independent of the judgment at law which was rendered, and the courts are open to the parties to litigate any claims based upon this ore treatment contract, and it certainly constitutes no foundation for the exercise of the extraordinary equitable jurisdiction which is here invoked.

The next allegation is that Charles D. McLure and L. S. McLure acting in collusion and for the purpose of cheating and defrauding the appellant and other creditors, closed down the Diamond R. Mines and concentrator. (Trans. p. 13-14.) The only fact which is alleged is that Charles D. McLure and L. S. McLure closed down the Mines and concentrator. Unless that fact is itself a fraudulent act, then there is no fraud whatever alleged in that connection. Appellant cannot merely place an adverb qualifying a certain act, and thereby make that act, which is not fraudulent in itself, fraudulent; but, it must show what there was connected with this action which made it fraudulent. The manner in which appellee defrauded anyone by closing the mines does not appear. This matter, however, is subject to the same objection in this suit as the preceding allegation. It is entirely separate and independent of the judgment at law, which is sought to be

set aside. The fraud upon which a Court of equity takes jurisdiction and revokes a judgment at law is a fraud directly affecting the judgment itself. These collateral, separate and independent matters which this Bill sets up cannot be considered by this Court in a suit of the character now before it. In a suit in equity to set aside a judgment at law the various rights and equities of the parties cannot be litigated, but the Court is confined specifically to the judgment which is attached, and it is only when clearly disclosed that the judgment itself was fraudulent; a good and meritorious defense thereto existed; that the defendant was prevented from presenting that defense by reason of the fraud of the plaintiff in such action; and the complainant party shows that he has been guilty of no neglect, that a court of equity will even consider disturbing the solemn judgment of a court at law. Collateral matters and other and independent equities cannot be submitted to a court of equity for the purpose of invoking its jurisdiction to set aside the adjudication of a Court at law.

The same objection exists as to the allegation concerning the redemption by appellee from the Bartlett judgment. (Trans. p. 14.) Moreover, this redemption, as disclosed by the complaint, was made on the 23rd day of March, 1905, long subsequent to the judgment which appellant seeks to have declared void. We may also suggest that it is a startling proposition that a

party can be charged with fraud and collusion for redeeming a prior lien in absolute accordance with the Statutes of this State, in order to protect his own lien upon the same property. We exercised our right under the Statutes to redeem from the prior lien, and the appellant itself shows that the statutes gave it the same right to redeem had it seen fit to do so. The appellant contends that appellee, holding a judgment against the company for some ninety thousand dollars, should have redeemed from this prior lien in the name of the company in order that the appellant, holding a lien subsequent to ours, could secure the benefit of our disbursement. Their demands are modest to say the least, but in view of the fact that this entire matter is long subsequent to the judgment which this Bill seeks to have declared void, we deem it hardly necessary to further discuss this allegation of the bill. We cannot resist remarking upon the statement in the bill, however, wherein appellant alleges a grievance by reason of the fact that Section 1236 of the Code of Civil Procedure of the State of Montana would compel the appellant in making a redemption to pay appellee's claim. It is not exactly clear to us whether or not the purpose of this allegation is to secure from this Court an amendment of this Section of the Codes of Montana, or whether the allegation is made for the purpose of disclosing the fraudulent conduct on the part of appellee in exercising the right which the laws of this

State grant unto him.

A long line of authorities have been cited to this Court clearly establishing the principles upon which a court of equity will act in matters of this kind, but the two cases which are absolutely conclusive of the questions here presented, and to which we desire to call the particular attention of this Honorable Court, is the case of Denton vs. Baker, decided by this court found in the 93 Federal Rep. at page 46; and the case of White vs. Crow, 110 U. S. 183.

Not only does the bill of complaint in this case fail to state facts sufficient to justify a Court of equity in setting aside a judgment of a Court at Law, rendered over five years ago, but even if the suit was original, and no judgment at law existed, we contend that this Court could not find from the allegations of this Bill that appellee would not now be entitled to receive the money which the Bill of complaint shows that he loaned to the Diamond R. company. The complaint alleges various collateral matters, which the pleader designates to have been fraudulent, but the complaint also affirmativey shows that appellee actually advanced the cash upon which his claim was based, and none of these collateral matters, alleged in the complaint, are specific either as to the amount or as to the facts upon which they are based; and thus we contend that the complaint is even insufficient to enable this Court to say that appellee would not be entitled to

preceed and secure a judgment for the moneys which the complaint shows to be due him, let alone exercise the extreme power of setting aside a judgment upon that claim rendered over five years ago by a Court at Law and of competent jurisdiction.

We respectfully submit that appellant's bill fails to disclose any equity; that the demurrer was properly sustained, and the judgment of the court below should be affirmed.

Respectfully submitted,

IRA T. WIGHT,

Solicitor and Counsel for Appellees.